[redacted]

[redacted] COURT OF THE UNITED STATES.

[redacted] TERM, [redacted] 1928.

No. [redacted]

[redacted]

[redacted] PLAINTIFF IN ERROR,

vs.

J. B. DILLS AND T. B. MATHEWS.

[redacted] THE [redacted] COURT OF THE STATE OF OKLAHOMA.

[redacted]

[redacted]

(28,827)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 872.

ELI BUNCH, PLAINTIFF IN ERROR,

vs.

J. B. COLE AND T. B. MATHEWS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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6 *Return to Writ.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of Oklahoma.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix a seal of said Supreme Court of the State of Oklahoma in Oklahoma City, on this 28th day of March, 1922.

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of the State of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

1 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to J. B. Cole and T. B. Mathews, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date of service hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein Eli Bunch is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma this the 15th day of March, 1922.

JNO. B. HARRISON,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.
By REUEL HASKELL, JR.,
Assistant.

Filed in Supreme Court of Oklahoma Mar. 27, 1922.
WILLIAM M. FRANKLIN,
Clerk.

1½ In the Supreme Court of the United States.

ELI BUNCH, Plaintiff in Error,

vs.

J. B. COLE and T. B. MATHEWS, Defendants in Error.

We, Attorneys of Record for J. B. Cole and T. B. Mathews, Defendants in Error in the above styled cause in the Supreme Court of the United States, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States, on the 21st day of March, 1922.

W. J. CRUMP,
MYRON WHITE,
R. P. DE GRAFFENRIED,
Counsel for J. B. Cole and T. B. Mathews.

Muskogee, Okla.

Filed in Supreme Court of Oklahoma Mar. 27, 1922.
WILLIAM M. FRANKLIN,
Clerk.

2 In the Supreme Court of the United States.

No. —.

ELI BUNCH, Plaintiff in Error,

vs.

J. B. COLE and T. B. MATHEWS, Defendants in Error.

Petition for Writ of Error.

Filed in Supreme Court of Oklahoma Mar. 15, 1922. William M. Franklin, Clerk.

To the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Eli Bunch, Plaintiff in Error in the above cause and Defendant in the Court below, and would show unto this Honorable Court that in the record and proceedings and rendition of the decree in the above cause by the Supreme Court of the State of Oklahoma, in the said suit between Eli Bunch and J. B. Cole and T. B. Mathews, manifest error has occurred, greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings, it will appear that there was drawn in question the validity of a statute and authority exercised under said State of Oklahoma on the ground of repugnancy to the

laws of the United States, and the validity of said statute and authority was upheld by the decree of the Supreme Court of Oklahoma; that the Federal question particularly involved, is as follows:

3 That the Plaintiff, Eli Bunch, was a fullblood Cherokee Indian, enrolled as such, and that there was allotted to him

The West Half (½) of the Northeast Quarter (¼) of Section Sixteen (16), Township Ten (10) North, Range Twenty(20) East in Muskogee County, Oklahoma;

that he was in the United States military service from May, 1917 to January 1st, 1919; that during the years 1917 and 1918, while he was in the United States military service, J. B. Cole and T. B. Mathews rented out his allotted land and collected for the use of said allotted land during said two years, the sum of $1,274.75; that during said time, J. B. Cole was Chairman of the Council of Defense at Porum, Oklahoma, which was an organization created to aid in carrying on the War and to look after the property of absent soldiers; that Eli Bunch brought this action against J. B. Cole and T. B. Mathews to recover for the rents so collected by them; that they set up as a defence to the action, the fact that they had taken two leases from Eli Bunch, one on July 5, 1916 for the use of his allotted land for 1917 and that they had paid Eli Bunch $75.00 thereunder, the amount specified in the lease; that they took another lease on July 28, 1917 from Mary Sunday, the mother of Eli Bunch, for the use of said allotted land for the year 1918 for which they paid her the sum of $75.00; that being the amount specified in the lease and that they occupied said land under said leases, and by virtue of the provisions of the State law, they were tenants at will and were required to pay only the rent specified in the lease; that Eli Bunch contended that such provisions of the State law were repugnant to

4 the Act of Congress approved May 27, 1908, being Chapter 199—"An Act for the Removal of restrictions from part of the land of allot-ees of the Five Civilized Tribes and for other purposes." The decision of the Supreme Court of Oklahoma, however, upheld the provisions of the State law as applied to leases by restricted Indians and held that by virtue of the provisions of the State law, J. B. Cole and T. B. Mathews became tenants at will and that the terms of the leases made by them governed as to the amount they should pay for the use of the land, and the State Supreme Court thereby held that provisions of said Act of Congress became inoperative when possession was taken under the leases prohibited by said Act, for the reason that by virtue of the State law, when possession was taken the provision of the leases made, although in violation of said Act of Congress, governed as to the liability of payment of rent. By virtue of the Statute of the United States relied upon, Eli Bunch was entitled to have said leases treated as absolute nullities and as conferring no rights upon J. B. Cole and T. B. Mathews, but the State Supreme Court held that by virtue of said laws, said leases fixed the rights of the parties and said Court

thereby held that the State laws prevail over the Statutes of the United States.

Eli Bunch further contended that by reason of the fact that he was in United States military service under the laws of the United States, J. B. Cole, who held the office of Chairman of the Council of Defence under the laws of the United States, was not entitled to make a profit of 750 per cent from renting out the land of Eli Bunch, the absent soldier. And Eli Bunch contended that by reason of the laws of the United States under which he was serving in the United States military service, he was entitled to recover a reasonable compensation from those who used his land at a time when he was prevented, by being in the United States military service, from looking after his own land and that this right arose from his being in the United States military service by virtue of the laws of the United States. This right so claimed was held by the trial court but was denied by the decision of the State Supreme Court, which thereby denied Eli Bunch a right claimed under the laws of the United States, all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the Assignment of Errors filed herein.

Wherefore, Petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of said Court in such cases made and provided, that the same may be inspected and corrected, as according to law and justice should be done.

NEFF & NEFF,
Attorneys for Eli Bunch.
NEFF & NEFF.

Writ of Error allowed as prayed for upon the giving of a bond by Eli Bunch in the sum of Two Hundred, ($200.00), Dollars.
Dated March 15, 1922.

JNO. B. HARRISON,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal of Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

6 In the Supreme Court of the United States.

No. 11230.

J. B. COLE and T. B. MATHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Assignment of Errors.

Filed in Supreme Court of Oklahoma, Mar. 15, 1922. William M. Franklin, Clerk.

Now comes the Defendant in Error, Eli Bunch, in the above entitled cause, and files the following assignment of errors, upon which he will rely upon the prosecution of a writ of error in the above entitled cause to the Supreme Court of the United States from the decision and decree made by this Court on the 31st day of May, 1921, which became final on the 7th day of February, 1922 at which time the petition for re-hearing was denied:

1. The Supreme Court of the State of Oklahoma erred in directing the trial court to sustain the motion of the Defendants, J. B. Cole and T. B. Matthews, for judgment on the pleadings and stipulation of facts and render judgment in favor of the Defendants and against the Plaintiff.

2. Said Supreme Court erred in not holding that Section 3783, Oklahoma Revised Laws of 1910 as applied to leases of a fullblood Cherokee Indian of his allotted lands is repugnant to the Statutes of the United States.

3. The Supreme Court of the State of Oklahoma erred in holding and deciding that the leases taken by J. B. Cole and T. B. Mathews
7 from Eli Bunch, which were prohibited by the laws of the United States, created rights in their favor and fixed the amount which J. B. Cole and T. B. Mathews were required to pay for rent of the allotted land of Eli Bunch.

4. The Supreme Court of the State of Oklahoma erred in holding that J. B. Cole and T. B. Mathews, by taking possession of the allotted land of Eli Bunch, a fullblood Cherokee Indian, under the leases prohibited by the laws of the United States, became tenants at will by reason of the laws of the State of Oklahoma.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that by reason of the laws of the State of Oklahoma, J. B. Cole and T. B. Mathews were not liable for the rents collected from the allotted land of Eli Bunch, a fullblood Cherokee Indian, by virtue of leases prohibited by the laws of the United States.

6. The Supreme Court of the State of Oklahoma erred in not holding and deciding that the laws of the State of Oklahoma relied upon to defeat the action of the Plaintiff, Eli Bunch, were repugnant to the Statutes of the United States, making the leases relied upon in this action utterly void and prohibiting the taking of such leases.

7. The Supreme Court of the State of Oklahoma erred in holding that the Chairman of the Council of Defence at Porum, Oklahoma was entitled to retain the sum of $1,124.75 out of a total of $1,274.75 collected by renting out the land of Eli Bunch during the period he was in actual military service of the United States.

Wherefore, the Plaintiff in Error, Eli Bunch, Defendant in Error in the Supreme Court of Oklahoma, prays that said decree and decision of the Supreme Court of Oklahoma be reversed and
8 that said Court be directed to direct the trial court, being the District Court of Muskogee County, State of Oklahoma to render judgment in favor of Eli Bunch and against J. B. Cole and T. B. Mathews for the sum of $1,124.75 with interest thereon and for all proper relief.

NEFF & NEFF,
Attorneys for Eli Bunch, Plaintiff in Error.
NEFF & NEFF,
WILLIAM NEFF,
L. E. NEFF,
ROBT. M. RAINEY,
STREETER B. FLYNN,
Attorneys for Eli Bunch, Plaintiff in Error.

9 Filed in Supreme Court of Oklahoma, Mar. 15, 1922. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. —.

ELI BUNCH, Plaintiff in Error,

vs.

J. B. COLE and T. B. MATHEWS, Defendants in Error.

Order Allowing Writ of Error.

Filed in Supreme Court of Oklahoma, Mar. 15, 1922. William M. Franklin, Clerk.

On this, the 15th day of March, 1922, came on to be heard the application of Eli Bunch, Defendant in Error in Case No. 11230 pending in the Supreme Court of the State of Oklahoma, entitled J. B. Cole and T. B. Mathews, Plaintiffs in Error vs. Eli Bunch,

Defendant in Error, for a writ of Error to the Supreme Court of the United States, and it appearing to the Court from the petition filed herein and the record filed therewith that the application ought to be granted and that a transcript of the record, proceedings and papers upon which the judgment of the Supreme Court of Oklahoma was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises,

It is therefore ordered that the writ of error be allowed upon Eli Bunch giving bond, conditioned as the law directs, in the sum of Two Hundred ($200.00) Dollars and that a true copy of the record, assignment of errors and all proceedings had in the case in the Supreme Court of the State of Oklahoma shall be transmitted to the Supreme Court of the United States, properly certified, as the law requires, that the Court may inspect the same and do what according to law should be done.

JNO. B. HARRISON,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal of Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

10 *Writ of Error.*

Filed in Supreme Court of Oklahoma Mar. 15, 1922. William M. Franklin, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Eli Bunch (Defendant in Error in the Supreme Court of Oklahoma,) and J. B. Cole and T. B. Mathews (Plaintiffs in Error in the Supreme Court of Oklahoma) wherein was drawn in question the validity of a Statute of the United States, and the decision was against its validity; and wherein was drawn in question the validity of a Statute or an authority exercised under the State of Oklahoma on the ground of their being repugnant to the laws and Statutes of the United States, and the decision was in favor of their validity; and wherein it was asserted by Eli Bunch that Section 3783, Revised Laws of Oklahoma, 1910 upon which the decision in this case was

based was repugnant to the Statutes of the United States regulating the leasing of the allotments of fullblood Cherokee Indians, and it was held that said Statute of the State of Oklahoma was not repugnant to said Statutes of the United States, and the decision was in favor of the validity of said Section 3783, Revised Laws of Oklahoma, 1910. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the
11 parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the same Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 15th day of March, A. D. 1922.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the United States District Court
for the Western District of Oklahoma.

Writ Allowed this 15 day of March, 1922.

JNO. B. HARRISON,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.
By REUEL HASKELL, JR.,
Asistant.

12 In the Supreme Court of the State of Oklahoma.

No. 11230.

J. B. COLE and T. B. MATHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Bond on Appeal.

Filed in Supreme Court of Oklahoma Mar. 15, 1922. William M. Franklin, Clerk.

Know all men by these presents:

That we, Eli Bunch, as principal, and the Southern Surety Company, as surety, acknowledge ourselves to be jointly indebted to J. B. Cole and T. B. Mathews, appellees in the above cause, in the sum of $200.00 condition- that,

Whereas, on the 31st day of May, 1921 in the Supreme Court of the State of Oklahoma in an appeal pending in that Court, wherein J. B. Cole and T. B. Mathews were Plaintiffs in Error and Eli Bunch was defendant in Error, numbered on the docket of said Court as No. 11,230, a decree was rendered against the said Eli Bunch and a petition for rehearing was denied on the 7th day of February, 1922, and the said Eli Bunch, having obtained a writ of error for a review of said decree by the Supreme Court of the United States,

Now, if the said Eli Bunch shall prosecute his writ of error to effect and answer all cost, if he fail to make his plea good, then the above *objection* to be void, else to remain in full force and virtue.

Dated March 13th, 1922.

ELI BUNCH,
By WILLIAM NEFF,
His Attorney,
Principal.

SOUTHERN SURETY COMPANY, [SEAL.]
By O. A. WILLS,
Vice-President.

Attest:

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

Approved this 15th day of March, 1922.

JNO. B. HARRISON,
Chief Justice of the Oklahoma Supreme Court.

13 *Resolution.*

Resolved, that the following officers, or either of them, to-wit:

C. S. Cobb, President,
E. G. Davis, Secretary,
J. H. Huckleberry, Vice-President,
J. T. Suggs, Vice-President,
F. A. Ungles, Vice-President,
O. A. Wells, Vice-President,
D. D. Smith, Vice-President,
Roy Armstrong, Vice-President,

be and they are hereby authorized and empowered, under the corporate seal of the company, in its name and as its act, to execute and deliver any and all bonds or undertakings, and renewals or continuations thereof, and to execute any and all consents or agreements to changes or modifications of such bonds or undertakings or of contracts guaranteed thereby.

* * * * * * *

I, E. G. Davis, Secretary of Southern Surety Company, a corporation of the State of Iowa, do hereby certify that the above and foregoing is a full, true and complete copy of a Resolution, duly adopted at the meeting of the Board of Directors of said Southern Surety Company, on the 27th day of March, A. D. 1919, as the same appears of record in the minutes of said meeting.

Witness my hand and the corporate seal of said company, this 13th day of March, 1922.

E. G. DAVIS, [SEAL.]
Secretary.

X86.

14 In the Supreme Court of the State of Oklahoma.

No. 11230.

J. B. COLE and T. B. MATHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Cross-petition in Error.

Filed in Supreme Court of Oklahoma Mar. 1, 1920. William M Franklin, Clerk.

Comes now Eli Bunch, the defendant in error, and complains of J. B. Cole and T. B. Mathews, the plaintiffs in error, and for his cross-petition in error, alleges that on the 14th day of February, 1920, in an action pending in the District Court of Muskogee County,

Oklahoma, wherein Eli Bunch was plaintiff and J. B. Cole and T. B. Mathews were defendants, the defendant in error recovered a judgment against the plaintiffs in error for $407.41, when he should have recovered a judgment for $1,320.00, and that the defendant in error duly filed a motion for a new trial and for modification of said judgment, which was overruled on the 20th day of February, 1920, and that a case made showing the proceedings had in said cause is hereto annexed and made a part of this cross-petition in error, and the defendant in error avers and alleges there is error in said proceedings as follows, to-wit:

1. Said District Court of Muskogee County, Oklahoma, erred in overruling the motion of this defendant in error, who was plaintiff in said Court, for a new trial.

2. Said Court erred in denying the motion of the plaintiff in said cause for a directed verdict in his favor for the sum of $1,320.00.

3. Said Court erred in directing a verdict for the plaintiff in said cause for only $407.41.

4. Said Court erred in holding that the plaintiff was not
15 entitled to recover the 1917 rents from the land in controversy as well as the 1918 rents.

And that as the facts are not disputed and plaintiff's right of recovery involves the determination of a pure and unmixed question of law the defendant in error prays that the judgment of the Court below may be reversed and set aside and that judgment may be rendered in favor of the plaintiff in said Court for the sum of $1,320.00, with interest thereon from the date of the judgment rendered from which the appeal was taken and for such other and further relief as may be just including the costs of the appeal.

NEFF & NEFF,
Attorneys for Defendant in Error.

16 In the District Court Within and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

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18 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Case-made.

Be it remembered, that on to-wit, this the 15th day of June, 1919, the plaintiff, Eli Bunch, commenced his action against the defendants, J. B. Cole and T. B. Mathews, by filing in the office of the Court Clerk, in and for the District Court, his petition, which said petition is in the words and figures following, to-wit:

19 In the District Court in and for Muskogee County, Oklahoma

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Petition.

Comes now said plaintiff and for his first cause of action against the defendants alleges and states:

1. That the plaintiff is a full blood Cherokee Indian and was enrolled as such and that he received as his homestead and surplus allotment the following described land:

The West Half of the Northeast Quarter of Section Sixteen, Township Ten North, Range Twenty East in Muskogee County, Oklahoma,

and at all the times hereinafter mentioned was the owner thereof. That in May, 1917, the plaintiff enlisted in the United States Navy and became first a seaman and then quartermaster on the battleship, Montana, which was engaged in convoying Allied and American troop ships and that plaintiff was honorably discharged on January 28th, 1919.

2. That during the times hereinafter mentioned the defendants were copartners in trade doing business under the firm name of Cole & Mathews and that in 1917 and 1918 the defendant, J. B. Cole was chairman of the Council of Defense at Porum, Oklahoma.

3. That the land above described is fine bottom land with 40 acres in cultivation and the balance in pasture, that during the years 1916, 1917 and 1918 about 27 acres of said land was in cotton crop and about 13 acres in corn each year and that the said land during the year 1917 produced about 22 bales of cotton of the value of about $3,520 and about $1,000 worth of corn, that during the year
20 1918 there was produced from said land about nine bales of cotton of the value of about $1,280.00 and about $1,000 worth of corn, that during the year 1916 the value of the crops produced from said land was about $2,000.00. That the value of the use of said pasture land during said years was about $200.00.

4. That during each of said years the defendants unlawfully used and occupied said pasture land and unlawfully and wrongfully converted said crops to their own use and benefit.

Wherefore, plaintiff prays judgment against the defendants for $200 with interest thereon for the use of said pasture land and for $2,000 with interest thereon from January 1st, 1917, for $1,520 with interest thereon from January 1st, 1918 and for $2,280 with interest thereon from January 1st, 1919.

21 For second cause of action plaintiff realleges all the matters set forth in the paragraphs designated 1, 2 and 3 in the foregoing and further alleges that in the year 1915 the defendants took a pretended lease on said land for the year 1916, but that said pretended lease was void because in violation of the statutes of the United States relating to the leasing of the allotments of full blood Cherokee Indians, that in or about June 1916 the defendants took a pretended lease upon said land for the year 1917, that in July 1917 the defendants took a pretended lease on said land for the year 1918 from the Mother of the plaintiff and in May, 1918, took a pretended lease of said land for the year 1919 from the Mother of the plaintiff but that all said pretended lease- were void because in violation of the statutes of the United States relating to the alienation of land of full blood Cherokee Indians and said leases were further void because his said Mother had no authority to make them and that said leases made by his said Mother were void for the reason that the same were made for a grossly inadequate consideration of $75.00 per year, which consideration was never paid the plaintiff, that plaintiff's mother is uneducated and does not know land or rental values and that defendants in dealing with her were under the obligation while plaintiff was in the United States Naval Service to deal fairly with her and to pay a fair and adequate consideration for the use of said land and owing to the difference in the position of the parties, the gross inadequacy of the consideration and the advantage taken, said leases were absolutely void, that in law and good conscience the defendants could not make a large profit out of their dealings with the plaintiff and his mother and the plaintiff's property during the period he was in the United States Naval Service, that upon his return the plaintiff
22 sought to obtain possession of his land, but the defendants asserted the right to the possession thereof and kept people

from renting it by telling them they had it rented and would not give possession and wholly prevented plaintiff from renting the pasture land or from obtaining an adequate rental for the other land and that defendants by means of an injunction suit to which the plaintiff was not made a party has had the lessee of plaintiff enjoined from taking possession of the land rented, that if the customary share of the crops had been turned over to the plaintiff for the years 1916, 1917 and 1918, he would have received about $2,400.00 from said land besides $225.00 for the use of the pasture and that the defendants collected and retained for themselves about that amount and in addition plaintiff has been damaged $500.00 by the unlawful withholding of said land for the year 1919, that the defendants unlawfully during each of said years sublet said land to tenants in violation of the statute and thereby forfeited their pretended leases and in April 1919 plaintiff served a ten days' notice to quit possession and plaintiff is entitled to double the value of the use of the property in addition to the detriment caused thereby, that defendants have acted wilfully, wrongfully and oppressively and plaintiff is entitled to recover exemplary damages in at least $1,000.00. That the value of the use of said land was at least the amount collected from it by the defendants and the
23 total values of the use thereof was about $2,625 during the years 1916, 1917 and 1918.

Wherefore plaintiff prays judgment against the defendants for $3,625 with interest thereon and $1,000 exemplary damages and costs.

NEFF & NEFF,
Attorneys for Plaintiff.

Lien Claimed.

24 The above and foregoing instrument is endorsed as follows:

No. 7062. District Court. Eli Bunch Plaintiff, vs. J. B. Cole et al., Defendants. Petition, District Court, State of Oklahoma, County of Muskogee. Filed Jun. 5, 1919. L. D. Martin, Court Clerk. Lien Claimed. Neff & Neff, Attorneys for Plaintiff.

That thereafter, to wit, and on the 11th day of June, 1919, the defendants by and through their attorneys of record, filed in the office of the court clerk, in and for the district court, Muskogee County, State of Oklahoma, their motion to strike, and said motion to strike is in the words and figures following, to wit:

In the District Court in and for Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Motion to Strike.

Comes now the defendants in the above entitled cause and moves the court to strike from the petition that part of said petition
25 beginning with the 10th line thereof, down to and including the 14th line thereof, because the same is irrelevant, immaterial and throws no light on plaintiff's cause of action.

2. Defendants move to strike that portion of plaintiff's petition as follows: In 1917 and 1918, defendant J. B. Cole was Chairman of the Counsel of Defense of Porum, Oklahoma, because the same is irrelevant and immaterial.

Wherefore defendants pray judgment of the court.

CRUMP & DE GRAFFENRIED,
Attorneys for Defendants.

The above and foregoing instrument is endorsed as follows:

No. 7062. Eli Bunch, Plaintiff, vs. J. B. Cole and T. B. Mathews, Defendants. Defendants' Motion to Strike. District Court, State of Oklahoma, County of Muskogee, Filed Jun. 11, 1919, L. D. Martin, Court Clerk. Neff & Neff, Att'ys for pl'ff. Crump & de Graffenreid attorneys for defendants. Mo. denied 6/30.

That thereafter to wit, and on the 30th day of June, 1919, the Court made and entered its order overruling the motion of the defendants to strike, which said order was duly spread of record upon
the journals of said court in Journal No. 17, at Page 599, and
26 is in the words and figures following, to wit:

Record of the District Court, Muskogee County, Oklahoma.

Monday, June 30th, 1919.

Court met pursuant to adjournment, presiding, the Honorable B. B. Wheeler.

Present: B. B. Wheeler, Judge, W. W. Cotton, County Attorney, J. D. Robbins, Sheriff, L. D. Martin, Court Clerk, and Clarence Thomas, Court Reporter.

Court having been opened in due form of law, the following proceedings were had, to-wit:

No. 7062.

ELIS BUNCH, Plaintiff,

vs.

J. B. COLE et al., Defendants.

Defendants' Motion to Strike.

Motion heard and denied.

(Whereupon Court adjourned until 9:00 o'clock tomorrow morning.)

That thereafter, to wit, and on the 6th day of October, 1919, the Defendants by and through their attorneys of record, filed in the office of the court clerk, their answer, which said answer, so
27 filed on said date, is in the words and figures following, to wit:

In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

COLE & MATHEWS, Defendant.

Answer.

Comes now the defendants by their attorneys, Crump & De Graffenried and for answer to the first cause of action contained in plaintiff's petition, they deny each and every allegation contained in said first cause of action.

And further answering herein the defendants deny each and every allegation contained in plaintiff's second cause of action in his said petition. Having fully answered herein, defendants pray to be discharged with their costs.

CRUMP & DE GRAFFENRIED,
Attorneys for Defendants.

Permission given to file above answer on this 6th day of October, 1919.

BENJAMIN B. WHEELER,
Judge.

28 The above and foregoing instrument is endorsed as follows:

In the District Court, Muskogee County, Oklahoma. Eli Bunch, Plaintiff, vs. Cole & Mathews, Defendants. No. 7062. Answer. District Court, State of Oklahoma, County of Muskogee. Filed Oct. 6, 1919. L. D. Martin, Court Clerk. Crump & de Graffenried, Attys. for Defts.

That thereafter to wit, on the 10th day of October, 1919, the defendants, by and through their attorneys of record, filed in the office of the Court Clerk, their amended answer, which answer, so amended and so filed on said date, is in the words and figures following, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Doing Business under the Partnership Name of Cole & Mathews, Defendants.

Amended Answer.

Comes now the defendants in the above entitled cause, leave of the Court being first had and obtained for that purpose, and amend their original answer filed and in lieu thereof, submit the
29 following as a substitute.

The defendants for answer to the first cause of action contained in the plaintiff's petition denies each and singular all the allegations contained in said count and demand strict proof of the same.

Further answering herein, these defendants admit that they used and occupied the land described in plaintiff's petition during the year 1916. The Defendants say they occupied and used said land under and by virtue of a written contract entered into between the plaintiff and defendants whereby the plaintiff let and leased said premises to these defendants on the 4th day of October, 1915 for the year 1916 to begin the first day of January 1916 and to end on the 31st day of December 1916. Whereby these defendants paid to the plaintiff the sum of Seventy five ($75.00) dollars as a consideration for said lease. That the plaintiff accepted the said sum of Seventy five ($75.00) dollars in full consideration and payment for the use and occupation of said premises for the year 1916. A copy of said lease being hereto attached and made a part hereof.

Defendants further answering herein admit they used and
30 occupied said premises described in the petition during the year 1917 and allege that they occupied same under and by virtue of a written lease contract executed by the plaintiff to these

defendants on the 5th day of July, 1916 for a consideration of Seventy five ($75.00) dollars.

Defendants further allege that said sum of Seventy five ($75.00) dollars was accepted by the plaintiff in full satisfaction and payment for the use and occupation of premises for the year 1917. A copy of said lease cannot be attached hereto for the reason that the original is lost or destroyed.

Defendants further answering herein admit that they occupied and used said premises described in the petition during the year 1918 and allege that the plaintiff went to the War in 1917, in the early part thereof and left his farm which is described in plaintiff's petition in the possession of his Mother, Mary Sunday, with full authority to lease and rent the same during his absence in the war. That on the 28th day of July, 1918, the said Mary Sunday, acting as the agent and for the use and benefit of the said plaintiff, Eli Bunch, entered into a contract by which she leased and let said premises by written agreement to these defendant- for the year 1918. That by the terms of said written contract made with the said
31 Mary Sunday as the agent of the plaintiff, these defendants agreed and promised to pay the said Mary Sunday as such agent the sum of Seventy five ($75.00) dollars for the use and occupation of said land and that they did pay said Seventy five ($75.00) dollars to the said Mary Sunday as the agent and representative of the plaintiff and that said sum of Seventy five ($75.00) dollars was accepted by the said Mary Sunday as the agent of the said plaintiff in full satisfaction and payment for the use and occupation of said land during the year 1918. Whereby these defendants contend and claim and assert they were in legal possession of the land above mentioned in plaintiff's petition during the three years of 1916, 1917 and 1918. A copy of last mentioned lease cannot be attached because original is lost.

As a further defense to plaintiff's cause of action in the said count, these defendants say that in the event for any reason the above described written leases should be held void by the Court, then and in that event these defendants assert and claim that they were the tenants at will of the plaintiff for the three years above mentioned and that they paid him the full consideration for the use and occupation of said land, to wit: for the year 1916, the sum of Sev-
32 enty five ($75.00) dollars; for the year 1917, the sum of Seventy five ($75.00) dollars; for the year 1918, the sum of Seventy five ($75.00) dollars and that the plaintiff accepted said sums of money in full payment and satisfaction for the use and occupation of said land for said three years.

Having fully answered the first cause of action, the defendants pray that they be discharged with their costs.

The defendants for answer to the second cause of action contained in plaintiff's petition deny each and every allegation contained in said second cause of action and demand strict proof of same.

Further answering herein, these defendants admit that they used and occupied the premises described in plaintiff's petition during the year 1916 and allege that they occupied and used said premises under

and by virtue of a written contract entered into by Eli Bunch, the plaintiff and these defendants on the 4th day of October, 1915, whereby the plaintiff let and leased all the premises described in his petition to these defendants for the year 1916 for the consideration of Seventy five ($75.00) dollars; that these defendants paid to the plaintiff the said sum of Seventy five ($75.00) dollars for the
33 execution of said lease and for the use and occupation of said premises which said sum of money the plaintiff accepted in full payment and satisfaction for the use and occupation of said land for the year 1916.

The defendants further answering herein admit that they occupied and used the land described in plaintiff's petition during the year 1917 and allege that they occupied and used said land under and by virtue of a written contract executed and entered into on the 5th day of July, 1916 with the plaintiff, Eli Bunch, whereby the said Eli Bunch, let and leased said land to these defendants for the year 1917 for cash consideration of Seventy Five ($75.00) dollars; that these defendants paid unto the said Eli Bunch the said sum of Seventy five ($75.00) dollars for the use and occupation of said land for the year 1917 and that the said Eli Bunch accepted said sum of Seventy five ($75.00) in full payment and satisfaction for the use and occupation of said land during the year 1917.

Further answering herein, these defendants admit that they used and occupied the land described in plaintiff's petition during the year 1918 and allege and assert that the use and occupation thereof was under a contract duly entered into by and between Mary Sunday, the mother of the plaintiff, and these defendants and defend-
34 ants allege that when this plaintiff entered the army in the early part of 1917, he made, constituted and appointed the said Mary Sunday, his Mother, as his duly authorized agent to handle, lease, let and rent the said land for him and in his stead during the time that he was engaged in the war and further answering allege that said contract made with the said Mary Sunday on July 28th, 1917 was made with the said Mary Sunday as the agent duly authorized and empowered by the plaintiff to execute the same and that for the terms of said lease the said Mary Sunday as the agent of the said plaintiff rented and leased the said land to these defendants for the year 1918 for the sum of Seventy five ($75.00) dollars, cash to her in hand paid; that said sum of Seventy five ($75.00) dollars was paid by these defendants to the said Mary Sunday as the agent of plaintiff and that as such agent she accepted the same in full satisfaction for the use and occupation of said premises for the year 1918. Whereby these defendants contend and allege that they were in the full and lawful possession of said land during the years 1916, 1917 and 1918 under and by virtue of the allege- written contracts as above set out.

35 These defendants further allege that in the event, if for any reason, the Court should hold or decide that any of the above written contracts as set out, are void, then and in that event, these defendants assert and allege that they used and occupied the said land for the years above mentioned as tenants at will of the plaintiff

and that they have paid the plaintiff in full for the use and occupation of said land for said three years as above set forth and that the plaintiff has accepted the same in full satisfaction for the use and occupation of same.

Wherefore, these defendants having fully answered both counts of plaintiff's petition and having fully answered said petition in full, these defendants pray that they be discharged with their cost.

CRUMP & DE GRAFFENRIED,
Attorneys for Defendants.

96107.

Agricultural Lease.

This lease, Made and entered into this 4th day of October 1915, by and between Eli Bunch of Porum, State of Okla., hereinafter called the lessor, and J. B. Cole and T. B. Mathews of Porum, State of Okla., hereinafter called the lessee, witnesseth:

36 1. That the lessor owns the following described real estate and premises, situate in Muskogee County, Oklahoma, to-wit:

The West Half (½) of the North east Quarter (¼) in Section Sixteen (16) Township Ten (10) Range Twenty (20) East.

2. That the lessor, in consideration of the covenants, promises and agreements herein contained and expressed, hereby rents, leases, and lets to the lessee the above described premises, to have and to hold the same from the First day of January, 1916, together with the buildings and improvements thereon, for agricultural purposes for Term of One year ending Dec. 31, 1916.

3. That the lessor covenants to place the lessee in the quiet and peaceable possession of said premises on or before the beginning of the term covered by this lease, and to protect the lessee in the quiet and peaceable possession of said premises during the term of this lease.

4. That the lessee promises and agrees to pay the lessor as rental for said premises for said term, the sum of Seventy-five dollars, payable as follows: Paid in hand this being the receipt for same.

5. That no part of said rent money shall be due or payable until the lessee shall have been placed in the quiet and actual pos-
37 session of said premises.

6. That —.

Signed and delivered on the day and date first herein written.

ELI BUNCH. [SEAL.]

(Acknowledgment.)

STATE OF OKLAHOMA,
Muskogee County, ss:

Before me, the undersigned Notary Public in and for said County and State, on the 4 day of October, 1915, personally appeared Ely Bunch to me well known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and official seal the day and year above written.

[Seal Geo. M. Neal, Notary Public, Muskogee County, Okla.]

GEO. M. NEAL,
Notary Public.

My commission expires 11-14-1917.

Filed for record on the 5th day of October, 1915, at 8 o'clock A. M.

C. H. EBERLE, [SEAL.]
County Clerk.

Certificate of True Copy.

STATE OF OKLAHOMA,
County of Muskogee, ss:

38 I, Lewis E. Kipp, County Clerk, in and for the County and State aforesaid, do hereby certify that the within and foregoing is a full, true, and correct copy of a certain instrument as the same appears on file, of record in my office, in Book 275 at Page 697.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of this office on this 9th day of Oct. 1919.

[SEAL.] LEWIS F. KIPP,
County Clerk.
By SPRAY HIKENS,
Deputy.

The above and foregoing instrument is endorsed as follows: #7062. In the Dist. Court. Eli Bunch, vs. Cole & Mathews, No. 7062, Amended answer. District Court, State of Oklahoma, County of Muskogee, ss. Filed Oct. 10, 1919. L. D. Martin, County Clerk. Permission is granted to file this amended answer. Benjamin B. Wheeler, Dist. Judge.

That thereafter, to wit, and on the 25th day of October, 1919, the plaintiff by and through his attorneys of record, filed in the office of the court clerk, his reply, which said reply, so filed on said date, is in the words and figures following, to wit:

39 In the District Court in and for Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Reply.

Comes now said plaintiff and for reply to the answer of the defendants denies each and every allegation of new matter therein contained and specifically denies that his Mother, Mary Sunday, was his duly authorized agent and for further reply alleges that the pretended leases set up in said answer were void for all the reasons alleged in plaintiff's petition.

NEFF & NEFF,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
Muskogee County, ss:

Eli Bunch, being duly sworn, says, he is the plaintiff in this action and that the denials contained in the foregoing reply are true.

ELI BUNCH.

Subscribed and sworn to before me this 6th day of November, 1919.

[SEAL.]

L. D. MARTIN,
Court Clerk,
By TOM L. FULLER,
Deputy.

40 The above and foregoing instrument is endorsed as follows: No. 7062. District Court, Eli Bunch vs. J. B. Cole et al. Reply. District Court, State of Oklahoma, County of Muskogee, filed Oct. 25, 1919, L. D. Martin, Court clerk.

That thereafter, to wit, and on the 12th day of February, 1920, there was filed in the office of the court clerk, a stipulation, which said stipulation so filed on said date, is in the words and figures, following, to wit:

In the District Court in and for Muskogee County and State of Oklahoma.

Number 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Stipulation.

It is hereby agreed by and between the plaintiff by his attorneys, Messrs. Neff & Neff and the defendants by their attorneys, Messrs. Crump, de Graffenried & White that the following state-
41 ment of facts are agreed to and may be offered in evidence in this case:

First. That the plaintiff, Eli Bunch, is a Full Blood, Cherokee Indian enrolled and recognized as such.

Second. That he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.

Third. That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year of 1915 and that these defendants used and occupied said land under said written contract.

Fourth. That during the year of 1916, to-wit; on July 5th, 1916, the plaintiff again *re* rented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917 for a cash rental of $75.00 which
42 said sum was then and there paid by defendant and accepted by the plaintiff in full for the use and occupation of said premises for the year of 1917 and that defendants occupied said land during the year of 1917 as tenants of plaintiff under said contract.

Fifth. That during the year of 1917 the plaintiff became a Soldier of the United States Government and was enlisted in the Navy during said year he was stationed at New York under the control of the Government and that while in New York these defendants by J. B. Cole wrote to the said plaintiff in regard to leasing the land for the year of 1918 and asked for a rental contract on

same and that the plaintiff Eli Bunch in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917 these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year of 1918 for a cash consideration of $75.00 and that these defendants used and occupied said land
43 during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed this *this* stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings.

NEFF & NEFF,
Attorneys for Plaintiff.
CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

The above and foregoing instrument is endorsed as follows:

7062. Eli Bunch vs. Cole and Mathews. Agreement of facts. District Court. State of Oklahoma, County of Muskogee, ss. Filed Feb. 12, 1920. L. D. Martin, Court Clerk.

That thereafter to wit, and on the 12th day of —, 1920, the defendants by and through their attorneys of record, filed in the office of the court clerk, a motion for judgment on the pleadings, which said motion for judgment on the pleadings, so filed on said date, is in the words and figures, following to wit:

44 In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Motion for Judgment on Pleadings.

Comes now the defendants and moves the Court to grant them a judgment on the pleadings together with the stipulation of facts filed herein and of this they pray judgment of the court.

CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

Minnesota State Library

The above and foregoing instrument is endorsed as follows:

No. 7062. In the District Court of Muskogee County, State of Oklahoma. Eli Bunch, Plaintiff, vs. J. B. Cole and T. B. Mathews, Defendants. Motion for judgment on pleadings. Filed in open court this 12th day of Feb. 1920. L. D. Martin, Court Clerk, by J. A. Staley, Dep. District Court. State of Oklahoma, County of Muskogee, ss. Filed Feb. 12, 1920. L. D. Martin, Court Clerk. Crump, de Graffenried & White, Attorneys for Defendants. M. O. O. R.

45 That thereafter, to wit, and on the 14th day of February, 1920, the court made and entered its order overruling the motion for judgment on the pleadings, filed by the defendants herein, which said order was duly spread of record upon the journals of said court, in journal number 18 and page 375 and is in the words and figures, following, to wit:

Record of District Court, Muskogee County, Oklahoma.

Saturday, February 14th, 1920.

Court met pursuant to adjournment, presiding, the Honorable B. B. Wheeler.

Present: B. B. Wheeler, Judge, W. W. Cotton, County Attorney, J. D. Robbins, Sheriff, L. D. Martin, Court Clerk, and Clarence Thomas, Court Reporter.

Court having been opened in due form of law, the following proceedings were had, to wit:

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

This cause, coming on to be heard in its regular order, defendants' motion for judgment on the pleadings, filed, heard and overruled.

Defendants except to the court's order overruling said motion and in open court give notice of appeal to the Supreme Court of this State.

46 The cause now goes to trial, the plaintiff is present in person, and by his attorneys, William Neff, Harry Davis, the defendants are present by J. B. Cole and their attorneys, Judge de Graffenried and Myron White.

The following named jurors were duly empaneled, chosen and sworn:

W. J. Pack, W. L. Lindhard, H. G. Weaver, Geo. H. Walker, J. C. Rifenbery, Andrew Watterson, E. B. Caughenour, R. L. Nay, W. R. Shirley, Jim Weatherford, E. H. Leroux, Jeff J. Kerr.

Witnesses sworn, the rule asked, plaintiff introduces his testimony and rests, defendants begin the introduction of their evidence and rests. Both sides rest.

The Jury returns the following instructed verdict: We, the Jury, in the above entitled action, duly empaneled and sworn, upon our oaths, and as instructed by the court, find the issues in favor of the plaintiff in the sum of $407.41, being the value of one-fourth of the cotton and one-third of the corn raised on said plaintiff's land for the year 1918 and interest thereon.

H. G. WEAVER,
Foreman.

The court then discharged the jury from further considera-
47 tion of the case.

Whereupon court adjourned until 9 o'clock Monday morning.

48 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Evidence.

Be it remembered that on to wit, this the 14th day of February, 1920, said day being one of the regular judicial days of the regular February, 1920, term of the District Court, in and for said county and state, the above entitled and numbered cause came regularly on for trial before the Honorable Benjamin B. Wheeler, one of the District Judges, in and for said county and state, and a jury, the plaintiff appearing in person and by his attorneys of record, Neff & Neff and Harry Davis, and the defendants appearing by their attorneys of record, Crump, de Graffenried & White, their attorneys, all parties having announced ready for trial, whereupon the following proceedings were had and done and the following evidence offered and introduced, to wit:

(Whereupon a jury is called, examined and sworn to try this cause.)

(Whereupon opening statement was made to the court and jury by Mr. Neff on behalf of the plaintiff, during which state-
49 ment the following objection was made by the attorneys for the defendants.)

By Mr. Neff: And that he collected the rents and that they were collected by the Chairman of the Council of Defense, who should be

looking after the interests of the Soldiers who were away at the front.

By Mr. de Graffenried: We object to that statement.

By the Court: Objection overruled, the court might state right here——

By Mr. de Graffenried: The defendants except.

By the Court: —That the court considers this case one that is peculiar in its nature and if the proof is made as claimed by the plaintiff, then the court's rulings upon this case will be based upon the peculiar facts in this case and not upon similar facts or similar relationships rather between two parties in ordinary times and under ordinary circumstances, the court feels, or being of the opinion that this case is surrounded by particularly peculiar and unusual
50 circumstances and conditions and the court is making this statement at this time in order that the record may show the reason for the ruling of the court as the case proceeds.

By Mr. de Graffenried: We want to save an exception.

By the Court: The Defendants except to the statement of the court and the exceptions are noted in the record.

(Whereupon opening statement is made to the court and jury by Mr. de Graffenried for the defendants.)

By Mr. de Graffenried: As stated by Mr. Neff, in 1915 this defendant—and you will see him when he comes on the stand, an intelligent, educated man capable of transacting business between mankind without any limitations and the courts of the United States permit these full blood indians to lease their land, but, unfortunately for Mr. Cole and Mr. Mathews the rental contract was made in 1915 to begin in 1916, and that, the courts denounce as a violation of the law, you can't make a rental contract before the time it be-
51 gins—for that technical reason that contract is declared to be void, now he entered into that contract, Cole and Mathews paid him a cash rental for the year 1916, which he accepted and was satisfied with that sum as full payment for that lease, the same thing occurred in 1916 and in 1917 he made the contract himself—in 1917 as stated by Mr. Neff this boy got caught in the war and was sent over or he was on his way and after he left—the agreed statement of facts will show that sometime during 1917 Mr. Cole while he was stationed in New York, wrote to him renting this land for the year 1918 and he wrote in answer to that letter that that land was in charge of his mother. And under that letter Mr. Cole did go and see his mother and he entered into a rental contract, a written contract in the year of 1918, for the rental of $75.00 cash, which was paid her as the agent of this boy, Mr. Bunch was always satisfied, so far as the evidence will show in this case, with that, still Mr. Neff brought this suit, he has collected his rents and was satis-
52 fied. Now Gentlemen of the Jury, this is a suit, not only to make him pay the second time the entire crop gathered off of that place in addition to $75.00 and which he paid. Now we will introduce evidence to you here gentlemen which will show you

that this land in that neighborhood has a cash rental value for the year of 1917 and 18—we will show you—will show this to you by farmers and by the defendant Cole, who is a large land owner, that this land is subject to overflow and that only part of it was—there is only forty acres in controversy—one part of it is sandy and subject to drouth—we will show that this land has a cash rental value of $2.00 per acre—in that neighborhood, now we will ask you on our part to find a true verdict for the value of that land (Leased) as between man and man and then deduct from that amount the amount already paid by Cole and Mathews of $150.00 and we believe that you will do that.

Whereupon ELI BUNCH, a witness called for and on his own behalf, having been first duly sworn, according to law, took
53 the witness stand and testified as follows:

Direct examination of Eli Bunch by Mr. Neff.

By Mr. Neff:

Q. What is your name?
A. Eli Bunch.
Q. Where were you in the latter part of 1916?
A. I was home the latter part of the year and stayed home about a month.
Q. Did you go away to school?
A. Yes sir.

By Mr. de Graffenried: Now I would like to suggest that we will offer in evidence to the jury the agreed statement of facts, if Mr. Neff don't offer it.
By the Court: All right.

By Mr. Neff:

Q. Did you go away to school Eli?
A. Yes sir.
Q. Where?
A. I went to Chilocco.
Q. Then in the spring of 1917 what did you do?
A. I went in the service in the Navy at that time.
Q. Were you drafted, or did you volunteer?
A. I volunteered.
54 Q. What time of the year?
A. That was along early in May.
Q. Early in May?
A. Yes sir.
Q. Now what battleship did you go off on——

By Mr. de Graffenried: The defendant objects because it is immaterial in this case, we will admit he enlisted in the army, that he went to the army.

By the Court: Sustained, I don't think it makes any difference what battleship he went on, he was in the service,—that is admitted.

By Mr. Neff:

Q. What part of the service were you in,—active service, or some office position?
A. I was in active service.
Q. On the land or sea?
A. On the sea.
Q. Where were you in the year 1918?
A. In 1918 I was around the west coast of Europe, patrolling.
Q. The west coast of Europe?
A. Yes sir.
Q. What were you doing there?
A. Patrolling and convoying.
55 Q. What do you mean by patrolling and convoying?

By Mr. de Graffenried: We object, incompetent, irrelevant and immaterial, what he was doing—the question is, was he in the service.
By the Court: Sustained.
By Mr. Neff: Well, we will save an exception.

Q. Now when did you return to Porum?
A. Returned to Porum in 1918—the latter part of the year.
Q. On a furlough?
A. Yes sir.
Q. When were you discharged from Military Service?
A. In January, 1919.
Q. Now then, you are a full blooded Indian aren't you?
A. Yes sir.
Q. Cherokee?
A. Yes sir.
Q. Your restrictions have never been removed?
A. No sir.
Q. And your land is your allotment—your homestead?
A. Yes sir.
Q. Now your mother, who made the lease, is she a full blood Cherokee?
A. Yes sir.
56 Q. Does she speak English?
A. Speaks very little English.
Q. What is her acquaintance with land values, if anything?
A. I don't think she has—she is not very far advanced along the line of business transaction.
Q. Where is that land located, Eli?
A. About four miles from Porum—better than four miles.
Q. On the river?
A. Canadian river.
Q. Cross examine?

Cross-examination of Eli Bunch by Mr. de Graffenried.

By Mr. de Graffenried:

Q. Mr. Bunch, how much of this land have you in cultivation?
A. About forty acres.
Q. The rest of it is woods and pasture?
A. Yes sir.
Q. Is the cultivated land homesteaded or surplus?
A. The surplus is the cultivated land.
Q. The surplus is the cultivated land?
A. Yes sir.
Q. Your homestead is in the wood and pasture?
A. Yes sir.
57 Q. Mr. Bunch, how much have you been to school?
A. What do you mean?
Q. Well are you pretty well educated?
A. No sir.
Q. You have been off to school?
A. I have only had seven years in school.
Q. Seven years?
A. Yes sir.
Q. Where did you have that?
A. Why,——
Q. Where?
A. At Chilocco.
Q. Where is that?
A. Chilocco is seven miles and a half south of Arkansas City, Kansas.
Q. You have been there seven years and a half?
A. Yes sir.
Q. Did you ever go to a country school here in this state or territory?
A. Yes sir.
Q. Indian school?
A. I went to country school about two sessions before I went to Indian school.
58 Q. You are what we call a pretty well educated Indian aren't you?
A. No, not on the average of Indians today.
Q. What?
A. No sir.
Q. You have had considerable experience around the world haven't you?
A. Yes.
Q. Mr. Bunch, isn't it a fact that Mr. Cole and Mr. Mathews paid you $75.00 in cash for this land for 1917—16 isn't it?

By Mr. Neff: We object to that as immaterial.
By the Court: What is the purpose of that.
By Mr. de Graffenried: I just want to show that his experience,

that he was willing to rent this land and did rent it and that was a fair consideration.

By Mr. Neff: That is not cross examination.

By Mr. de Graffenried: It is cross examination, that he considered it as a fair consideration for this land.

By the Court: What direct testimony is this based upon.

By Mr. de Graffenried: On the agreed statement of facts.

59 By the Court: That is not in testimony——

By Mr. de Graffenried: We except.

By the Court: It is not proper cross examination.

By Mr. de Graffenried:

Q. You accepted the rent for 1917, did you not?

By Mr. Neff: We object to that, as not proper cross examination.

By the Court: Sustained.

By Mr. de Graffenried: We except.

By Mr. de Graffenried:

Q. You rented that land yourself for 1917, didn't you? And 16?

By Mr. Neff: We object as not proper cross examination.

By the Court: It is agreed that he rented the land for——

By Mr. de Graffenried: I want to show that he did it himself.

By the Court: Well it is agreed that the defendant did it himself, or that he did it himself.

By Mr. de Graffenried: I want to show further that the consideration was a fair rental value.

60 By the Court: That is not proper cross examination.

By Mr. de Graffenried: We except—that is all.

Redirect examination of Eli Bunch by Mr. Neff.

By Mr. Neff:

Q. Did you make an effort to serve a subpœnae on Joe Moles?
A. Yes sir.
Q. Did you find him?
A. No sir.
Q. Is he in this county?
A. No sir.
Q. He testified in the former trial?
A. Yes sir.
Q. That is all?

By Mr. de Graffenried: That is all.

(Witness excused.)

Whereupon J. A. DECKER, a witness called for and on behalf of the plaintiff, having been first duly sworn, according to law, took the witness stand and testified as follows:

Direct examination of J. A. Decker by Mr. Neff.

By Mr. Neff:

Q. What is your name?
A. J. A. Decker.
61 Q. Where do you live?
A. Near Porum.
Q. What is your occupation?
A. Farmer.
Q. Are you acquainted with the Eli Bunch allotment?
A. Sir.
Q. Are you acquainted with the Eli Bunch allotment?
A. Yes sir.
Q. Did you know that allotment in the year 1917?
A. Yes sir.
Q. What kind of land was it?
A. It was bottom land—pretty fair land.
Q. Along the Canadian river?
A. How long.
Q. Is it along the Canadian river?
A. Yes sir, right on the banks of the Canadian.
Q. Now then in 1917, did you have a farm there?
A. Yes sir, and I helped farm it in 1917.
Q. Mr. Decker, do you know what is the usual and customary way of renting land in that community during the year 1917?
A. Yes sir. One-third and one-fourth.
Q. Now what do you mean by one-third and one-fourth?
A. One-third of the corn and one-fourth of the cotton.
62 Q. They went to the landlord?
A. Yes sir.
Q. For the land?
A. Yes sir.
Q. That was the customary way of renting land—now then what did you do to the land in 1917?
A. We raised cotton on part of it and part of it was corn on it.
Q. Now what did you have to do with raising the cotton?
A. I helped cultivate it—I was just only working by day's work.
Q. What did you have to do with the picking of it?
A. I helped pick it.
Q. Now how many rows was there?
A. There was two hundred and twenty four rows on the Eli Bunch land.
Q. Now in connection with the picking of the cotton was the cotton weighed?
A. Yes sir.

Q. Now do you know how much each row made of seed cotton?
A. Well——

By Mr. de Graffenried: The defendants object to this line of testimony and contend that the measure of damages—the true
63 measure of damage is the cash rental value of the land——
By the Court: Overruled.
By Mr. de Graffenried: We except.

By Mr. Neff:

Q. Give the number of pounds of seed coton?
A. Well they didn't all make the same—it run anywhere from a hundred and twenty-five to a hundred and fifty pounds to the row.
Q. Now what was the average?
A. I should judge about a hundred and thirty or a hundred and thirty-five—there was some rows that would make a hundred and fifty, but I don't remember of a row that went under a hundred and twenty-five.
Q. Did you see the corn there?
A. Yes sir.
Q. What kind of corn was it?
A. It was fairly good corn—I didn't help gather the corn.
Q. You don't know the amount of that?
A. No sir.
Q. Do you know how many rows of cotton there were in 1918?
A. The same amount—two a hundred and twenty-four.
Q. How about the cotton grade in 1917?
64 A. How did it grade?
Q. Yes.
A. It was a good grade of cotton in 1917.
Q. Do you know what time you picked it?
A. It was sometime, something after October——
Q. Do you know when the last was marketed?
A. Yes sir, just a few days before Christmas—just a short time before Christmas.
Q. Cross examine?

Cross-examination of Mr. Decker by Mr. de Graffenried.

By Mr. de Graffenried:

Q. Do you know what those rows made in 1918?
A. No sir, I didn't, I helped pick it, but there was part of it good cotton, that burned very bad in 1918.
Q. You say it burned bad?
A. Yes sir, dry weather, it was a poor crop in 1918, there was a part of it, the low part, that was good cotton, and then on the ridges it was—you might say burned up almost.
Q. How about the corn in 1918?
A. The corn was just fair, it wasn't as good as it was in 1917.
Q. A poor crop of corn in 1918?

65 A. Yes sir.

Q. That is all—wait a minute, do you know of anybody renting land in that neighborhood at a cash rental value?

A. No, not down in that part—I do on the prairie, but not down in the bottom, I don't know of anybody renting it for cash in the bottom.

Q. Is it as good land as the land right around it on the outside?

A. Well I don't believe it is hardly as good land as the land just across the line—I don't believe it is as good hardly—it won't stand a drouth as good.

Q. Isn't it subject to overflow?

A. Well it hasn't overflowed since I have been in this country—nine years.

Q. That is all.

By Mr. Neff:

Q. Do you know the price cotton sold for at the time the cotton was marketed, in 1917?

A. Well, no I don't—I didn't raise no cotton—I could not say what.

Q. Al-right, that is all

By Mr. de Graffenried: That is all.

(Witness excused.)

66 Whereupon WEEPEY MOLES, a witness called for and on behalf of the plaintiff, having been first sworn according to law, took the witness stand and testified as follows:

Direct examination of Weepey Moles by Mr. Neff.

By Mr. Neff:

Q. What is your name?
A. Weepey Moles.
Q. Where do you live?
A. Near Porum.
Q. What is your occupation?
A. Farming.
Q. Are you familiar with and also farmed the land—the Eli Bunch allotment during the year 1917?
A. Yes sir.
Q. Who farmed that allotment?
A. Well——
Q. Yourself?
A. Me and my brother.
Q. Your brother's name is what?
A. Joe Moles.
Q. Who did you rent it from?

A. Mr. Cole.
Q. One of the defendants here?
A. Yes, sir.
67 Q. A member of the firm of Cole and Mathews, at Porum?
A. Yes sir.
Q. Now then, how much was in cotton in 1917—one question before I get to that—on what terms did you rent it in 1917?
A. One-third——

By Mr. de Graffenried: We object to that.
By the Court: Overruled.
By Mr. de Graffenried: We except.

By Mr. Neff:

Q. What terms?
A. One third and one fourth.
Q. One third of the corn?
A. Yes sir.
Q. One fourth of the cotton?
A. Yes sir.
Q. Do you know what the customary way of renting land in that community was in 1917 and 18?
A. One third and one fourth.
Q. That is the share that went to the owner of the land?
A. Yes sir.
Q. Now then, how much cotton did you revise on that land in 1917—that is, how many rows of cotton, do you know?
68 A. Two hundred and twenty-four rows.
Q. Do you know how many acres was in cotton?
A. About twenty-six acres, I guess.
Q. About twenty six acres?
A. Yes sir.
Q. Now what did that cotton yield per row, of seed cotton?
A. A hundred and thirty pounds.
Q. A hundred and thirty pounds?—Now then, when did you commence marketing?
A. The 20th of October.
Q. And when did you finish?
A. Just before Christmas.
Q. Did you turn over a part of the proceeds of the cotton to the defendant, Mr. Cole?
A. Yes sir.
Q. What share?
A. One fourth.
Q. One fourth?
A. Yes sir.
Q. What price did that cotton bring per pound—seed cotton?

By Mr. de Graffenried: We object to the question.
69 By the Court: Overruled.
My Mr. de Graffenried: Exception.

By Mr. Neff:

Q. What was the price per pound?
A. Ten and a half cents.
Q. That is seed cotton?
A. Yes sir.
Q. Now then, how much corn did you raise that year?
A. Thirty five bushels to the acre.
Q. How many acres?
A. Nine acres.
Q. Now did you turn over a share of the corn to Mr. Cole?
A. Yes sir.
Q. What share?
A. One third.
Q. When did you deliver the corn?
A. I believe it was about January.
Q. About January?
A. Yes sir.
Q. What was the market price of corn?
A. About a Dollar twenty, I believe.
Q. A Dollar twenty—now then, coming to 1918, Mr. Moles, did you farm the Eli Bunch allotment together or separate?
A. We farmed it separate.
70 Q. How many acres of cotton did you raise?
A. Six acres.
Q. How many acres did Joe Moles raise?
A. About fifteen acres.
Q. About fifteen?
A. Yes sir.
Q. And you had six?
Q. How much cotton—how many pounds of seed cotton was raised on that six acres?
A. Six thousand pounds.
Q. What time of the year did you market that?
A. It was in October.
Q. October?
A. Yes, sir.
Q. Did you turn any over to Mr. Cole?
A. Sir?
Q. Did you turn a share of the proceeds of that to Mr. Cole?
A. Yes sir.
Q. What share?
A. One fourth.
Q. What was the market price of cotton at that time? Of seed cotton?
71 A. Eleven and a half cents.
Q. Now how much corn did you raise on the Eli Bunch allotment?
A. I only had five acres.
Q. How many bushels per acre?
A. About twenty-five bushels.

Q. So the corn wasn't as good as it was in 1917?
A. No sir.
Q. Did you turn a share of that corn to Mr. Cole?
A. Yes sir.
Q. What share?
A. One-third.
Q. What was the market price of corn at that time?
A. A Dollar ten.
Q. A Dollar ten—what time of the year did you deliver the corn?
A. In November.
Q. In November?
A. The last, I think of that year.
Q. How much cotton—about how much cotton did Joe Moles raise on his 17 acres?

By Mr. de Graffenried: We will object to his telling what Joe Moles raised.
By the Court: Overruled.
By Mr. de Graffenried: Exceptions.

72 By Mr. Neff:

Q. Just go ahead?
A. About five bales.
Q. About five bales?
A. Yes sir.
Q. How many pounds of cotton in a bale, of seed cotton?
A. Fifteen hundred pounds.
Q. That would make seventy-five hundred pounds—did you market that cotton about the time—would that make seventy-five hundred pounds?
A. Yes sir.
Q. Did you market this cotton about the time he did?
A. He marketed his cotton later than I did.
Q. Was the price changed during that time?
A. Yes sir—he got as much as I got.
Q. Now then, do you know anything about how much corn he raised?
A. No sir, I don't.
Q. Do you know how many acres of corn?
A. No, I could not say to the exact amount of corn, the exact amount of acres—I didn't help gather the corn.
Q. How is that?
A. I didn't help gather the corn that year.
73 Q. What kind of land is that?
A. It is bottom land.
Q. What quality?
A. Well it is good land—river bottom land.
Q. Cross-examine?

Cross-examination of Weepey Moles by Mr. de Graffenried.

By Mr. de Graffenried:

Q. The land that you farmed there of Bunch's is not as good land as you are cultivating now is it?
A. Well I don't believe it is hardly.
Q. Mr. Moles, the south end is subject to drouth on account of sand isn't it?
A. Well there is a portion of it that is.
Q. You ran an account there with Cole and Mathews there during that year didn't you?
A. Sir——

By Mr. Davis: We object to that as immaterial.
By the Court: What is the purpose of that.
By Mr. de Graffenried: To show that he was a crop renter.
By the Court: Sustained.
By Mr. de Graffenried: Exceptions. That is all.

74 By Mr. Neff:

Q. What land are you farming now, that he asked you about?
A. I am farming Mr. Cole's land.
Q. Farming Mr. Cole's land now?
A. Yes sir.
Q. What kind of land is that?
A. Black gumbo land.
Q. How is that?
A. Black gumbo land.
Q. That is all.

By Mr. de Graffenried: That is all.

(Witness excused.)

(Whereupon D. W. WATTERS, a witness called for and on behalf of the plaintiff, having been first duly sworn, according to law, took the witness stand and testified as follows:)

Direct examination of D. W. Watters by Mr. Neff.

By Mr. Neff:

Q. What is your name?
A. D. W. Watters.
Q. Where do you live?
A. Well, I live about four miles east of Porum.
Q. What is your occupation?
A. Farming.
75 Q. Are you acquainted with the Eli Bunch allotment?
A. Yes sir.

Q. Do you know—who had the land,—who had the leasing of that during 1919?
A. Who had the leasing of that in 1919.
Q. Yes, 1919?
A. Well I rented it in 1919.
Q. Who collected the rents?
A. Who collected the rents?
Q. Yes sir?
A. Off of the place in 1919.
Q. Yes sir?
A. Why I suppose Mathews and Cole collected the rents.
Q. What did they pay you?
A. What did they pay me?

By Mr. de Graffenried: We object to the question.
By the Court: What is the purpose of that.
By Mr. Neff: Well, it shows the valuation in 1919.
By Mr. de Graffenried: No sir, there was a law suit here in this court——
By the Court: Sustained.

76 By Mr. Neff:

Q. Do you know the customary way of renting land—what was the customary way of renting land in that community during the years of 1917 and '18?
A. It was one third and one fourth—that is customary.
Q. One third of the corn and one fourth of the cotton?
A. Yes sir.
Q. That goes to the landlord?
A. Yes sir.

Q. That is all?

Cross-examination of Mr. Watters by Mr. de Graffenreid.

By Mr. De Graffenreid:

Q. You rented the land in 1919?
A. Sir?
Q. You rented the land in 1919?
A. Yes, sir.
Q. And you paid cash rental for it——

By Mr. Neff: We object to that—if you will let us go into the whole circumstances——
By the Court: Sustained.
By Mr. de Graffenreid: They show the usual and customary way to rent land was one third and one fourth, I want to show by him that he paid cash rent for this land the very year he is testifying about.
77 By the Court: Sustained.
By Mr. de Graffenreid: We except.

By the Court: You objected to any testimony in regard to 1919 and it was sustained.

By Mr. de Graffenreid: No sir, I didn't object on that grounds.

By the Court: I know, but you objected on another ground.

By Mr. de Graffenreid: I objected to what Cole paid him in the settlement, I never objected to them showing the usual and customary way——

By the Court: There is nothing to base it on.

By Mr. de Graffenreid: Well I am satisfied with my position—we will save our exceptions.

By the Court: Al-right.

By Mr. de Graffenried: That is all.

By Mr. Neff: That is all.

By Mr. De Graffenried:

Q. Part of this land is subject to drouth, isn't it?

A. Well—well, I don't know much about the land, only it didn't make so very well this year, I don't suppose,—I don't know exactly how much it made.

Q. It is pretty sandy isn't it—a part of it?

78 A. Well it is not to say so overly much sand on it, only close to the river and that is not on Mr. Bunch's land you know.

Q. Is it subject to overflow?

A. Subject to overflow.

Q. Yes?

A. I don't remember of their ever being an overflow of it, myself.

Q. Al-right—that is all?

(Witness excused.)

By Mr. Neff: Now I want to read in evidence a part of the evidence of Joe Moles, on the former trial.

By Mr. de Graffenreid: We object to that being read here, there is no reason on earth why his deposition could not be taken, he is still in the jurisdiction of this court, so far as we know, from the evidence in this case.

By the Court: We have a statute on that, what is it.

By Mr. Neff: You can read the former testimony—and we can put in the deposition when he is outside of the county.

79 By the Court: In other words you can take his deposition any place, therefore this statute is not enforced ——

By Mr. de Graffenreid: No, I say out of the jurisdiction of the court——

By the Court: When he is out of the county he is out of the jurisdiction of the court—then there is no place according to your theory——

By Mr. de Graffenreid: Well, we make the objection—that is all we do.

By the Court: You have nothing to advise the court as to why your objection is good.

By Mr. de Graffenreid: I rely upon the statute, if you want me to I will find that.

By the Court: The Court wants to be advised if you have anything upon it before ruling, if that is all you have to offer, the objection will be overruled.

By Mr. de Graffenreid: I want to make an objection, as it is incompetent, irrelevant and immaterial, and it is not competent testimony in this case.

By the Court: Overruled.

By Mr. de Graffenreid: We except.

80 By Mr. Neff: Now is there any objection to Mr. Ingram remaining in here while I read this portion.

By Mr. de Graffenreid: No sir, what are you offering Mr. Neff.

By Mr. Neff: About all I am going to do is show the amount of corn raised in 1918.

By the Court: Whose testimony is this.

By Mr. Neff: Joe Moles.

By the Court: Al-right.

By Mr. Neff: I just want to put in the part I read.

By Mr. de Graffenreid: Well.

By Mr. Neff: I want the record to show that was testimony taken at the former trial.

By Mr. Neff: In the District Court, in and for Muskogee County, State of Oklahoma, Eli Bunch, Plaintiff, vs. Cole and Mathews, Defendants. No. 7062. Evidence. Be it remembered that on to wit, the 6th day of November, 1919, said day being one of the regular judicial days of the regular November, 1919, term of said court, the above entitled and *and* numbered cause came regularly on

81 for hearing, before the Honorable Charles D. Watts, one of the District Judges, in and for said County and State, and the plaintiff appearing in person and by his attorneys, Neff & Neff and Harry G. Davis, and the defendants appearing in person and by their attorneys, Crump & de Graffenreid, and both sides having announced ready for trial, the following testimony is offered and introduced to wit, among other things—I am offering a part of the testimony of JOE MOLES.

By Mr. de Graffenried: To which the defendant objects, as incompetent testimony in this case.

By the Court: Overruled.

By Mr. de Graffenried: We except.

By Mr. Neff:

Q. What is your name?
A. Moles.
Q. Your first name?
A. Joe.
Q. Where do you live?
A. Near Porum.
Q. What is your occupation?
A. Farmer.
Q. Did you farm the Eli Bunch allotment?

A. Yes sir.
Q. When?
A. In '17 and '18.
Q. Who did you rent it from?
A. Mr. Cole.
Q. What rent did you pay?
A. One third and one fourth—one third of the corn and
82 one fourth of the cotton.
Q. Do you know the customary way of renting land in that vicinity during the last six years?
A. Customary renting is one third and one fourth, I suppose, that is the way I rent it——
Q. Then—now in 1918?
A. Well I cultivated a part of the Eli Bunch land, the biggest part of it, and it made to the best of my knowledge on what I had in, about six or seven bales of cotton—six bales I will say.
Q. How much corn?
A. Well I had just a small patch of the Eli Bunch land last year, my brother had a part, I judge I made one hundred to one hundred and twenty five on the Eli Bunch land.
Q. What was corn worth last year?
A. I don't know just what the standing price was, something over a Dollar per bushel, about One Dollar and Twenty Cents, somewhere along there, what I bought this season I paid Two Dollars and Fifty cents a bushel for it.

By Mr. Neff: That is all that I care to offer—I will read this much on cross-examination.

Q. Now in 1918, how much cotton did you say you cultivated on the Eli Bunch land?
A. Cultivated about fifteen or sixteen acres.
Q. How much cotton did you cultivate—did you cultivate any other cotton on any other land that year?
A. No sir.
Q. How much did you raise?
A. About six bales—that is all.

83 By Mr. de Graffenried: Is that all the cross examination.
By Mr. Neff: No.
By Mr. de Graffenried: Well, I object to him reading part of the evidence, and not reading the whole of it.
By the Court: Do you want the rest of it read.
By Mr. de Graffenried: That is my objection.
By the Court: Do you object to it.
By Mr. de Graffenried: I object to him offering a part of the evidence and not the whole of it.
By the Court: The objection is sustained, and at the suggestion of the attorney for defendants, you will be required to read all of the cross examination.
By Mr. Neff: Now, I might suggest, it is the rule on depositions and I suppose the same rule covers this, one party can offer any part he wishes, he sees fit to.

By Mr. de Graffenried: I am taking the position that the whole evidence is incompetent.

By the Court: Then you are not requesting the balance be read.

By Mr. de Graffenried: No sir, I am not requesting it, but
84 I am objecting because he does not read it.

By the Court: Overruled.

By Mr. de Graffenried: We except.

Attached to the testimony of Joe Moles was the Certificate of the Court reporter in the form prescribed by Section 1792 of the Revised Laws of 1910.

(Whereupon A. T. INGRAHAM, a witness called for and on behalf of the plaintiff, having been first duly sworn, according to law, took the witness stand and testified as follows:)

Direct examination of Mr. Ingraham by Mr. Neff.

By Mr. Neff:

Q. What is your name?
A. A. T. Ingraham.
Q. Where do you live?
A. Porum, Oklahoma.
Q. What is your occupation?
A. General Mercantile business.
Q. How long have you been in the general mercantile business?
A. About twenty one or two years.
Q. Do you deal in cotton down there—did you deal in cotton down there in 1917?
A. I did.
Q. You have been subpœnaed as a witness here in this case?
A. Yes sir.
85 Q. Now have you brought your journal showing your cotton dealings during a great part of 1917?
A. I noticed here it covers the month of September and a little better than half of October.
Q. What is the last that this covers?
A. October, 1917.
Q. Now what were cotton prices along about that time?
A. Well on October the 17th, on that day we paid an average of Ten Dollars and Forty cents per hundred for seed cotton.
Q. Now Mr. Ingraham, do you know how the cotton crops around Porum graded in the fall of 1917?
A. As to price or grade.
Q. As to grade?
A. Well in the year 1917—that was an exceptional fall for this country, it began with pretty weather and continued through September and October and practically November, then—before the grade began to deteriorate, that particular year for the reason we had a dry fall.
Q. Then in October and November, how did the cotton grade?

A. Well, I would say a hundred bales in October would run—sufficient amount of it, unless you accidentally got a bad bale, there would be sufficient amount of it running about middling to make the hundred bales grade about middling on the average buying of a hundred bales.

86 Q. Now just explain what you mean by middling grade?

A. Well middling grade of cotton is the standard on which the price varies up or down—the middling basis on cotton is what we all figure from and the big markets and buyers they have a certain price all the year around on middling cotton, then if you have a grade that runs strict middling or middling fair, it is so many points more than middling cotton is worth—if it is a high grade, then strict low middling varies downward so many points off.

Q. Now Mr. Ingraham, will you just do a little figuring for our benefit—we have some figures put in here but we haven't got them totaled—have you a pencil?

A. Yes sir.

By Mr. Davis:

Q. Will you kindly figure the amount of cotton raised on 224 rows at a 130 pounds to the row.

A. I figure it about Twenty-nine Thousand pounds—exactly 29,120.

Q. Will you kindly take one fourth of that?

A. 7,280.

Q. Now Mr. Ingraham, will you figure that out at ten and a half cents a pound?

87 A. Ten Hundred and Ninety-two Dollars, wouldn't it.

Q. Aren't you mistaken on that?

A. I am just looking to see.

Q. How much is one fourth?

A. 7,280.

Q. Then multiply it by 10 and a ½?

A. Well at 10 that would be $728.00 then the half—I got that a little wrong there.

Q. That would amount to how much?

A. $764.40.

Q. Now Mr. Ingraham, will you kindly take nine acres of corn making thirty-five bushels to the acre, and see how much corn it would produce?

A. Two hundred and eighty-five bushels—no three hundred and fifteen.

Q. How many bushel?

A. Three hundred and fifteen.

Q. Now one third of that would be what?

A. One hundred and five?

Q. One hundred and five bushel at $1.20 a bushel would be how much?

A. $126.00.

Q. Now will you kindly add $764.40, the amount of cotton to $126.00, for the corn and state the amount?

88 A. $890.40.

Q. Will you kindly figure six per cent interest on $890.40 for two years?

A. (No answer.)

Q. Does that make a $106.85?

A. No, I really think it would be a $197.00 wouldn't it—did you say eighty nine.

Q. $890.40?

A. Oh yes, I didn't get your first total figured right.

Q. That would be a $106.84?

A. Yes.

Q. Now will you kindly add that to the $890.40?

A. What did you call that last item, interest.

Q. $106.84?

A. $997.24.

Q. Now Mr. Ingraham, will you kindly take three thousand pounds of cotton——

By Mr. de Graffenried: Wait a minute, if the court please, I believe I will offer an objection to this matter of computation by the witness, the jury is supposed to be able to compute when the evidence is in and for the further reason that is a matter of mere computation and to bring a witness in here and go through this
89 mathematical class with him is clearly incompetent and prejudicial to the rights of the defendants.

By Mr. Davis: We can't compel the jury to figure it.

By Mr. White: It is merely a matter——

By the Court: I agree with Mr. White that the attorneys are just as competent to figure and argue it to the jury.

By Mr. de Graffenried: There are men on this jury that can figure it better than we can right now.

By Mr. Davis: If the jury is willing to figure it and go through with that work, al-right.

By the Court: Objection sustained, to any further statement along this line. The court will hold that the attorneys can figure out what the amount is in their argument and state it to the jury.

By Mr. Neff:

Q. Now Mr. Ingraham, were you living at Porum in 1917 and 18?

A. Yes sir.

Q. Who was chairman of the council of defense at Porum?

By Mr. de Graffenried: Objected to.

By the Court: Overruled.

90 By Mr. de Graffenried: We except—we object to it for the reason it is incompetent, irrelevant and immaterial and has nothing to do with this case and throws no light upon the issues involved.

By the Court: Overruled.

By Mr. de Graffenried: We except.

A. Why, I am not quite positive—Mr. J. B. Cole was.
Q. That is all, cross examine?

By Mr. de Graffenried: No questions.

(Witness excused.)

By Mr. Neff: We offer in evidence the stipulation as to certain facts agreed to and I will read that.

(Whereupon said stipulation having been offered in evidence and now read to the court and jury by Mr. Neff, is admitted in evidence by the court, and is in the words and figures, following, to-wit:)

In the District Court in and for Muskogee County, and State of Oklahoma.

Number 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

91 *Stipulation.*

It is hereby agreed by and between the plaintiff by his attorneys, Messrs. Neff & Neff and the defendants by their attorneys, Messrs. Crump, de Graffenried & White that the following statement of facts *are* agreed to and may be offered in evidence in this case:

First. That the plaintiff, Eli Bunch, is a Full Blood, Cherokee Indian enrolled and recognized as such.

Second. That he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.

Third. That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year of 1916 and that these defendants used and occupied said land under said written contract.

92 Fourth. That during the year of 1916, to wit; on July 5th, 1916, the plaintiff again rerented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917 for a cash rental of $75.00 which said sum was then and there paid by defendant and

accepted by the plaintiff in full for the use and occupation of said premises for the year of 1917 and that defendants occupied said land during the year of 1917 as tenants of plaintiff under said contract.

Fifth. That during the year of 1917, the plaintiff became a Soldier of the United States Government and was enlisted in the Navy and during said year he was stationed at New York under the control of the Government and that while in New York these defendants by J. B. Cole wrote to the said plaintiff in regard to leasing the land for the year of 1918 and asked for a rental contract on same and that the plaintiff Eli Bunch in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sun-
93 day as the agent of the plaintiff, Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year of 1918 for a cash consideration of $75.00 and that these defendants used and occupied said land during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agred *this* this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings.

NEFF & NEFF,
Attorneys for Plaintiff.
CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

Endorsed: 7062, Eli Bunch, vs. Cole & Mathews, Agreement of Facts. District Court, State of Oklahoma, County of Muskogee. Filed Feb. 12, 1920. L. D. Martin, Court Clerk.

94 By Mr. Neff: We rest.

By the Court: Proceed.

By Mr. de Graffenried: I want to make a motion.

By the Court: All right, Gentlemen of the Jury, I will give you a five minutes' recess, during the recess you will not discuss this case among yourselves, or with anybody else or permit anyone to discuss it with you, nor will you make up your minds what your verdict shall be until you have—until this case has finally been submitted to you.

(Whereupon the Jury retires from the court room.)

By Mr. de Graffenried: Comes now the defendants, Cole and Mathews, and demurs to the evidence offered by the plaintiff in this case, and for grounds of demurrer state, that the evidence offered by the plaintiff shows that under the contract of rental entered into

by and between the plaintiffs and the defendants, that the defendants were tenants at will of the plaintiff and that the manner of determining the rents due to the plaintiff would be from an
95 inspection of the rental contract entered into and that this plaintiff should not be entitled to recover in this action for further grounds of demurrer, the defendants show that no competent evidence has been offered to show the true measure of damages for the reason—for the rental of said land for the year 1916 and 17—17 and 18.

By the Court: As the court indicated at the beginning of this trial there are some peculiar conditions and circumstances surrounding this case and the evidence introduced by the palintiff shows that Mr. Cole, one of the defendants in this case, was chairman of the council of defense of Porum and the surrounding country, or at Porum during the war—that the court will take judicial notice of the fact that the chairman of the council of defense, in any community was given very great power, relating to the farming interest and conducting of the business of the community and especially relating to farming, the council of defense was a power to see that farms were cultivated, that thrashing was done and em-
96 powered to regulate the harvesting of crops and was given extraordinary power as a war measure. The proof shows that the plaintiff, while he was away from home and in the service of his country was written to by the defendant, Cole, Chairman of the *of the* Council of Defense, concerning the renting of his land for 1918, that the defendant, Cole, was told that this matter was left with the plaintiff's mother. The Court will hold in this case, not based upon any precedents, in as much as there can be no precedents at this time, or a decision at this time, that the fact that the chairman of the council of defense at Porum inquired about the renting of this land for 1918, and was told that the land or that the matter was left in the hands of the plaintiff's mother and the fact that the plaintiff and his mother were full blood indians and were not capable of renting land—that is land during the summer of 1917,—at the time this inquiry was made for the year 1917, and in view of the fact that the defendant Cole took possession of this land in the year 1918 and rented it out to a farmer who gave crop
97 rent for the land, that in so doing, the defendant Cole was acting in the dual capacity of an individual and chairman of the council of defense at Porum, and is accountable to the plaintiff for every cent of rent received from that farm in 1918.

By Mr. White: I want the court to indicate—just make it plain that he was chairman of the council of defense at the time these contracts were entered into.

By the Court: I don't know—I take it that at the time the first contract was entered into, he was not,—that was entered into in 1916, the court is of the opinion that it is a fair conclusion that there was no council of defense at that time and so far as he knows—the court—unless there is some proof to the contrary, will proceed upon the basis that this council of defense was organized sometime

in 1917, and that while defendant Cole had charge of this land in 1918 he was chairman of the council of defense.

By Mr. de Graffenried: You haven't passed on the motion or demurrer.

98 By the Court: The demurrer will be overruled.

By Mr. de Graffenried: To which the defendants both except.

(Whereupon the Jury are returned into open court and take their places in the jury box.)

By the Court: You agree the jurors are all present.

By Mr. White: Yes sir.

By Mr. Neff: We do.

(Whereupon J. B. COLE, one of the defendants, a witness called for and on behalf of the defendants having been first duly sworn, according to law, took the witness stand and testified as follows:)

Direct examination of J. B. Cole by Mr. de-Graffenried.

By Mr. de Graffenried:

Q. Your name is J. B. Cole?

A. Yes sir

Q. You are one of the defendants in this case?

A. Yes sir.

Q. Mr. Cole, how long have you lived in Porum?

A. I believe it is ever since Porum has been there——

Q. Ten or twelve years?

A. Fourteen or fifteen—fourteen years I believe.

99 Q. What is your business there Mr. Cole?

A. I run a general store.

Q. Mercantile store?

A. Yes sir, and own some land and lease some land down there.

Q. Farming land?

A. Yes sir.

Q. About how much land do you lease, Mr. Cole, in that section of the country?

A. Well I don't know.

Q. Roughly?

A. I will say seven or eight hundred—maybe a thousand acres, I don't know.

Q. For what?

A. Cash consideration.

By Mr. Neff: We object to that as incompetent, irrelevant and immaterial.

By Mr. de Graffenried: We expect to show by this witness and others that this land has a cash rental value for 1917 and 18 and show what it is and that is the true measure of damages in the case.

By the Court: Objection sustained.

By Mr. de Graffenried: We except.

100 By Mr. de Graffenried:

Q. Mr. Cole, do you know whether or not the land in controversy, mentioned and described in the plaintiff's petition, has a cash rental value—had a cash rental value for the year 1917 and '18?

A. Yes sir.

By Mr. Neff: Wait a minute, we object to that as incompetent, irrelevant and immaterial and move the answer be stricken.

By the Court: Sustained.

(Whereupon the following offer to prove, is made by the defendants, out of the presence and hearing of the jury.)

By Mr. de Graffenried: To which we except—the defendants now offer to prove that the land described in the plaintiff's petition had a reasonable cash market value—rental value for the years of 1917 and '18, and that the reasonable cash rental value of said land for said two years—and that the said land was worth, as rental, the sum of $2.00 per acre, for the cultivated land and $.25 (Twenty-five cents) per acre for the woods pasture.

By the Court: Any objections.

By Mr. Neff: We object on the same grounds.

101 By the Court: Sustained.

By Mr. de Graffenried: The defendants except—that is all Mr. Cole.

Q. Mr. Cole, do you know Mary Sunday?

A. Yes sir.

Q. What degree of intelligence is she, Mr. Cole—does she understand the English language?

A. She is over the average of the Cherokees.

Q. Can she talk English?

A. Yes sir.

Q. Understand English?

A. Yes sir.

Q. Understand a contract she makes?

A. Well I take it she does, she writes her name well.

Q. That is all—wait a minute, how much of that land is in cultivation Mr. Cole?

A. Hardly half of it.

Q. Forty acres?

A. Hardly half of it.

Q. What is the character of the other land?

A. It is in timber.

Q. Woods pasture?

A. Yes sir.

Q. Mr. Cole, does that land overflow?

102 A. I have saw it under water, a bigger portion of it.

Q. From what?

A. From the river.

Q. What time was that?

A. Oh, it has been several years ago.

Q. What about it—is it drouthy or not?
A. The south end of it is very drouthy.
Q. Do you know what causes that?
A. How is that.
Q. State to the jury what causes it?
A. Well there is so much sand.
Q. Sandy?
A. Yes sir—it can't stand the drouth.
Q. That is all.

By Mr. Neff: That is all.
By Mr. de Graffenried: Stand aside.
By the Court: No questions.
By Mr. Neff: No sir.

(Witness excused.)

(Whereupon F. W. KEITH, a witness called for and on behalf of the defendants, having been first duly sworn, according to law, took the witness stand and testified as follows:)

103 Direct examination of Mr. Keith by Mr. de Graffenried.

By Mr. de Graffenried:

Q. What is your name?
A. F. W. Keith.
Q. What is your given name—your initials?
A. F. W.
Q. F. W. Keith?
A. Yes sir.
Q. Where do you live?
A. I live near Porum.
Q. What direction from Porum?
A. Southwest.
Q. What is your business, Mr. Keith?
A. Farming.
Q. How long have you lived down there?
A. I have lived down there in that country about thirteen years.
Q. Do you know the land—do you own land or rent land?
A. I own land and rent some too.
Q. Mr. Keith, do you know the Eli Bunch land?
A. Yes sir.
Q. Do you know whether that land and land of its character there in that neighborhood has a cash rental value and had a cash rental value in 1917 and '18?

By Mr. Davis: Wait a minute, we object to that as incompetent, irrelevant and immaterial.
104 By the Court: Sustained.
By Mr. de Graffenried: Now I will ask this further question—we except.

By Mr. de Graffenried:

Q. Do you know the reasonable cash rental value of that Bunch allotment for the year 1917 and '18?

By Mr. Davis: We object, as incompetent, irrelevant and immaterial.
By the Court: Sustained.
By Mr. de Graffenried: To which the defendants except.
By Mr. White: And make the same offer.
By Mr. de Graffenried: We now make the same offer to prove by this witness the same state of facts, that we offered to prove by the witness, Cole.
By the Court: Does the plaintiff object.
By Mr. Neff: Yes sir.
By the Court: Sustained.
By Mr. de Graffenried: We except, that is all, Mr. Keith.

(Witness excused.)

(Whereupon LEE STANFIELD, a witness called for and on behalf of the defendants, having been first duly sworn, according
105 to law, took the witness stand and testified as follows:)

Direct examination of Lee Stanfield by Mr. de Graffenried.

By Mr. de Graffenried:

Q. What is your name?
A. Stanfield.
Q. What is your given name?
A. Lee.
Q. Where do you live Mr. Stanfield?
A. Briertown.
Q. Is that in the neighborhood of Porum?
A. It is six miles south.
Q. What business have you been engaged in?
A. Farming.
Q. Farming—do you know the Eli Bunch allotment?
A. Yes sir.
Q. Can you tell, or do you know, whether that land had a cash rental value for the year 1917 and '18?

By Mr. Davis: Now wait a minute, the same objection.
By the Court: Sustained.
By Mr. de Graffenried: Exceptions.

By Mr. de Graffenried:

Q. Now I will ask you one question further, do you know what the reasonable cash rental value of that land was for the years of 1917 and '18?
106 By Mr. Davis: We make the same objections.

By the Court: Sustained.

By Mr. de Graffenreid: To which we except, and the defendant now offers to prove by this witness the same state of facts that he offered to prove by the witness Cole when he was on the stand.

By Mr. Davis: To which we object.

By the Court: Sustained.

By Mr. de Graffenried: To which we except—that is all.

(Witness excused.)

(Whereupon J. B. COLE, one of the defendants, a witness for and in his own behalf, having been recalled for further direct examination and having been heretofore first duly sworn, according to law, took the witness stand and testified as follows:)

Further direct examination of Mr. Cole by Mr. de Graffenried.

By Mr. de Graffenreid:

Q. Mr. Cole, when were you made chairman of the council of defense of Porum?

A. In February, 1918.

Q. You were not chairman of the council of defense, when any of those contracts were made?

107 A. No sir.

Q. That is all—who was present when you were made president of the council of defense?

A. Our Honor here—Judge Wheeler.

By the Court: I helped select him.

By Mr. Neff:

Q. You were chairman when you collected the rents in 1918, wasn't you?

A. I was.

Q. That is all?

By Mr. de Graffenreid: That is all.

(Witness excused.)

By Mr. de Graffenried: Under your Honor's ruling I don't think we have anything further to offer.

By the Court: Both sides rest.

By Mr. Davis: At this time, under the undisputed testimony in this case, we believe the plaintiff is entitled to a judgment and it amounts to $1,404.65, now there is to be deducted from that $75.00 paid for 1916 which he kept—1916 for the 1917 rents, together with six per cent interest thereon which leaves $9.00—which leaves a total amount of $1,320.00 for which plaintiff now moves the

108 court to instruct the jury to return a verdict in this case.

By the Court: Let me ask you Mr. Davis, what have you

figured the rents under the testimony in this case, received by the defendant for the year 1918.

By Mr. Davis: The year 1918, the first item is 3,000 pounds of cotton at 11½¢ a pound one fourth of which would be $60.25, then there was 7,500 pounds of cotton at the same price, one fourth of which would be $215.62, making a total amount of cotton $301.87, for the nine acres of corn making twenty five bushel would be a hundred and twenty five bushel, one third of which at a $1.10 a bushel was $45.82, the deposition of Joe Moles, is that he raised from 120 or a 125 bushel—assuming a hundred bushel at a hundred and ten per bushel, the proof shows, makes $36.66 total of that for 1918, would be $384.35 and six per cent interest.

By the Court: How much without the interest?

By Mr. Davis: $384.35.

By the Court: Al-right.

By Mr. Davis: Six per cent interest on it for one year
109 would be $23.06.

By the Court: Making a total of what.

By Mr. Davis: Total for that one year.

By the Court: Yes.

By Mr. Davis: I haven't figured the total for that year, I figured it all together, $407.41.

By the Court: Now just give me your total for the year 1917.

By Mr. Davis: The total for the year 1917 would be $890.40, exclusive of—$890.40.

By the Court: How much interest.

By Mr. Davis: $106.84.

By the Court: Making a total of what?

By Mr. Davis: $997.24.

By the Court: Gentlemen of the Jury——

By Mr. de Graffenreid: Now before you instruct I want to make a motion.—Comes now the defendants and move the court to instruct the jury to return a verdict in their behalf for the reason that the admitted facts shows that these defendants occupied the land of the plaintiff under a rental contract entered into with the plaintiff at a rental of $75.00 which sum was paid and accepted by the plaintiff in full satisfaction of the rental for the years
110 1917 and '18 and that even though the contracts under which the defendants entered into may be void, still the defendants would be tenants at will of the plaintiff and that the contract has fixed the rental for the rents for 1917 and '18 and is binding on the plaintiff and he cannot therefore recover in this action.

By the Court: The motion is overruled.

By Mr. De Graffenried: We except.

By the Court: Gentlemen of the Jury, I am going to excuse you for five minutes, during the recess I will ask you to remain outside of the court room and don't discuss any matters connected with this case either among yourself or anybody else and don't make up your mind what your verdict shall be in this case.

(Whereupon the Jury are excused from the court room.)

(Whereupon the court takes a recess of five minutes at which time reconvenes in regular session and all parties appearing as heretofore, the Jury present in the box, Whereupon the following
111 proceedings were had and done, to-wit:)

By the Court: Gentlemen, do you agree the jurors are all present.
By Mr. Davis: Yes sir, we do.
By Mr. White: Yes sir.
By the Court: Gentlemen of the Jury, this is rather a peculiar lawsuit, one that don't ordinarily come before a court because of its peculiarity, there is very little precedents to guide the court in determining what is to be done in this case, there don't seem to be much dispute as to the facts, that the defendants, Cole and Mathews, received for the year of 1917, $890.40, being the value of one fourth of the cotton and one third of the corn raised on the land, I think—if they are chargeable for that amount, they should pay six per cent interest amounting to $106.84, making a total of $997.24 for the year of 1917, for the year of 1918 the total value of one fourth of the cotton and one third of the corn amounts to $384.35 and one year's interest thereon at six per cent is $23.00, making a
112 total of $407.41—those figures are not disputed and the court therefore presumes they are correct. The contract entered into in 1916 for the renting of this land in 1917 is conceded to be void, the plaintiff in this case was in school up until April, 1917, and was in the Army, having enlisted sometime in April, it is the opinion of the court that had the plaintiff in this case, early in 1917, gone to the defendants and told the defendants that they could not have the land for 1917 under the void agreement made in July, 1916, and tendered back the $75.00 or if he didn't have the $75.00 at that time without tendering that back, then the defendants, Cole and Mathews, would not have been entitled to the rent in controversy for the year of 1917, and if they had got the rents after having been told by the plaintiff, that he didn't wish to rent them that land for the year of 1917 for a cash rental of $75.00 then he could have recovered from the defendants in this case the sum of $890.40 and interest thereon, making a total of $997.24, but the
113 court is of the opinion that inasmuch as he didn't when he had an opportunity to do so, make any objection or complaint to their use of the land for 1917, up to the time he entered the Government Service in April, he is in the same position as if he didn't enter into the service at all, so far as the year 1917 is concerned, and therefore is not entitled to recover for the year 1917, in this case. The Court is of the opinion that the situation is different concerning the year 1918, that early in 1917, this plaintiff entered the Navy as one of his Government's soldiers, that he was in the Service, and that the defendants wrote him in regard to the land for 1918, this letter having been written during the year 1917, that he wrote back and said that his mother had been intrusted with the care of the land, that the fact that these defendants went to and made a contract with the mother does not relieve them of their obligation to this plaintiff, it is conceded that the contract made
114 with the mother is void and of no effect and the plaintiff in this case, being in the army and subject to the absolute dir-

tion of his government was not in a position to object or affirm any action in regards to his land, and the court is of the opinion that the boys at the front were helpless and the court is of the opinion that it was the duty of every citizen of the United States to look after, care for and protect the families of relatives and the property of the boys who were serving their country, practically without pay—their expenses paid and very little more, the court is of the opinion that the defendants in this case were at fault in attempting to hold the land for the year of 1918 for the payment of $75.00 to the mother, when as the proof shows, they got $384.35 from that land. The court holds that the making of such a profit off of the property of a Soldier who was answering his country's call in time of need is not to be approved by any court of this land. That the court should not approve such an action, that there is an obligation
115 that the citizens of the country owe to those who went to the front — fight for our protection—that the court would be ratifying or would ratify and approve an action which in good conscience cannot be approved by any good citizen and for that reason the court is going to instruct the jury to return a verdict in favor of the plaintiff in the sum of $407.41, being the value of one fourth of the cotton and one third of the corn raised on the land of this plaintiff for the year of 1918—I have prepared that sort of a verdict and will ask one of your number to sign the verdict.

By Mr. De Graffenried: May I ask that the records show whether your Honor deducted from that amount the $75.00 paid.

By Mr. Neff: He never got it.

By Mr. De Graffenried: One of his agents got it—I want the record to show, I request the court to deduct that.

By the Court: The record may so show.

By Mr. De Graffenried: The defendant excepts to the court denying the request.

By the Court: The record may show that prior to the di-
116 rection of this verdict, the court overrules the motion of the plaintiff for a verdict—a verdict in the sum of $1,320.00.

By Mr. Davis: To which action of the court the plaintiff excepts.

By Mr. De Graffenried: Now I desire to except on behalf of the defendants to the instruction given by the court to return a verdict in favor of the plaintiff, for the amount mentioned in the verdict.

By the Court: It may be so shown. Anything further.

By Mr. Neff: That is all.

By Mr. De Graffenried: That is all.

(Whereupon, the verdict is handed by the Jury and signed by one of the Jurors and returned into the court.)

By the Court: Read the verdict.

(Whereupon the verdict is read by the court clerk.)

By the Court: Gentlemen of the Jury, is that your verdict, under the instruction of the court.

By the Jurors: Yes sir.

By the Court: You may now be excused until 1:00 o'clock.

117 (The above and foregoing testimony was all of the testimony offered or introduced upon the trial of said cause.)

118 That thereafter, to wit, and on the 14th day of February, 1920, the jury returns into open court their verdict, which said verdict was duly received by the court, and spread of record upon the journals of said court, in record number 18 at page 375, and is in the words and figures following, to wit:

Civil Verdict in the —— Court, Muskogee County.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Verdict.

We, the Jury in the above entitled action, duly empaneled and sworn, upon our oaths, and as instructed by the court, find the issues in favor of the plaintiff in the sum of $407.41 being the value of ¼ of the cotton and ⅓ of the corn raised on said plaintiff's land for the year 1918, and interest thereon.

W. J. WEAVER,
As Foreman.

The above and foregoing instrument is endorsed as follows:

119 No. 7062, Eli Bunch, Plaintiff, vs. J. B. Cole, et al., Defendant-. Civil Verdict. District Court, State of Oklahoma, County of Muskogee, ss. Filed Feb. 14, 1920, L. D. Martin, Court Clerk. Recorded in District Court, Journal Record No. 18, Page 375. L. D. Martin, Court Clerk. Compared O. C.

That thereafter, to wit, on the 14th day of February, 1920, the plaintiff, by and through his attorneys of record, filed in the office of the court clerk, his motion for a new trial, which said motion for a new trial, so filed on said date, is in the words and figures, following, to wit:

In the District Court in and for Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Motion for New Trial.

Comes now said plaintiff and moves the court to vacate and set aside the verdict in this cause and to grant the plaintiff a new trial upon the following grounds:

1. Error in the assessment of amount of recovery the amount allowed being too small in that plaintiff should have been al-
120 lowed to recover the 1917 rents from the land in controversy as well as the 1918 rents.

2. That the verdict is contrary to law in so far as the same is less than $1,320.00, and is contrary to the evidence.

3. Errors of law occur-ing at the trial and excepted to by the plaintiff.

4. Error in denying the motion of the plaintiff for a directed verdict in the sum of $1,320.00.

5. Error in directing a verdict for the plaintiff for only $407.41.

6. Error in holding that the defendants were not liable for the 1917 rents of the land in controversy.

Wherefore plaintiff prays that a new trial be granted.

NEFF & NEFF,
Attorneys for Plaintiff.

The above and foregoing instrument is endorsed as follows:

No. 7062, District Court, Eli Bunch, Plaintiff, vs. J. B. Cole, et al., Defendants. Motion for New Trial. District Court, State of Oklahoma, County of Muskogee, ss. Filed Feb. 14, 1920, L. D. Martin, Court Clerk. Mo. O. R.

121 That thereafter, and on to wit, the 16th day of February, 1920, the court made and entered its journal entry of judgment, which said journal entry of judgment was duly filed in the office of the court clerk, on said date, and duly spread of record upon the journals of said court, and is in the words and figures, following, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Journal Entry of Judgment.

Now on this 14th day of February 1920, this cause duly comes on for trial and the plaintiff appears in person and by attorneys and the defendants appear in person and by attorneys and both sides announce ready for trial and the jury is empaneled and sworn and the evidence is heard and at the close of plaintiff's evidence the defendants demur thereto and the demurrer is overruled and the defendants except, and at the close of the whole case the plaintiff moves for a directed verdict for $1,320.00, which is denied by the court, and
the plaintiff excepts and the defendants move for a directed
122 verdict which is by the court denied and the defendants except and the Court of its own motion directs a verdict in favor of the plaintiff in the sum of $407.41, being the rent and interest of the land in controversy for 1918, and the plaintiff excepts to the ruling of the court in denying recovery of the 1917 rents and the defendants except to the action of the Court in allowing recovery of the 1918 rents and the jury by direction of the Court returns the following verdict:

Verdict.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

We, the Jury in the above entitled action, duly empaneled and sworn, upon our oaths, and instructed by the Court, find the issues in favor of the plaintiff in the sum of $407.41, being the value of the one-fourth of the cotton and one-third of the corn raised on said plaintiff's land for the year 1918, and interest thereon.

H. T. WEAVER,
Foreman.

It is therefore ordered, adjudged and decreed that the plaintiff Eli Bunch, do have and recover of the defendants J. B. Cole and
123 T. B. Mathews, the sum of $407.41, and the costs of the action taxed at $— to which judgment both the plaintiff and the de-

fendants except and in open Court give notice of appeal therefrom to the Supreme Court of the State of Oklahoma.

BENJAMIN B. WHEELER,
Judge.

(O. K.
DE GRAFFENRIED.)

The above and foregoing instrument is endorsed as follows:

District Court. No. 7062. Eli Bunch, Plaintiff, vs. J. B. Cole and T. B. Mathews, Defendants. Journal Entry of Judgment. District Court, State of Oklahoma, County of Muskogee, ss. Filed Feb. 16, 1920. L. D. Martin, Court Clerk. Recorded in District Court, Journal Record No. 18, Page 377. L. D. Martin, Court Clerk. Compared. O. C.

That thereafter, to wit, and on the 16th day of February, 1920, the defendants by and through their attorneys of record filed in the office of the court clerk, a motion for a new trial, which said motion for a new trial, so filed on said date, is in the words and figures, following, to wit:

124 In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Doing Business under the Firm Name of Cole & Mathews, Defendants.

Motion for a New Trial.

Come now the defendants in the above entitled cause by their attorneys, Crump, De Graffenried & White and moves the court to set aside the verdict of the jury rendered herein and grant them a new trial for the following reasons, to-wit, which materially affect the substantial rights of these defendants.

1st. Because the verdict of the jury is contrary to law.

2nd. Because the verdict of the jury is contrary to the evidence, and is not supported by either the evidence or the law.

3rd. Because of irregularities in the proceedings of the Court and of orders made by the Court by which the defendants were prevented from having a fair trial.

4th. Because of errors of law occurring at the trial and was duly excepted to by the defendants.

125 5th. Because the Court erred in overruling the motion of the defendants for judgment on the pleadings taken in connection with the agreed statement of facts filed herein which agreed

state of facts was by agreement of the parties to be considered a part of the pleadings filed herein for the purpose of the motion for judgment on the pleadings, to which ruling of the Court in overruling such motion the defendants duly excepted.

6th. Because the Court in overruling said Motion for judgment on the pleadings erred in holding that even though the contract entered into by and between the plaintiff through his agent and authorized representative Mary Sunday, although void and that these defendants being tenants at will, still, that the contract could not be looked to in determining the rents to be paid by these defendants and in further holding that said contract could not be paid by these defendants, to which ruling of the Court the defendants enforced as to the provisions governing the amount of rent to be then and there duly excepted.

7th. Because the Court erred in permitting the plaintiff over the objection of the defendants to show by the evidence of plaintiff's witnesses the amount of crops raised on the lands in contro-
126 versy for the year 1918 and in further holding that the plaintiff was entitled to recover one third of all the grain raised and one fourth of all the cotton raised by these defendants on said land and further erred in permitting the plaintiff to prove the value of the corn raised on said land during the year 1918 and the value of the cotton raised on said land during the year 1918 and then directing that the plaintiff should recover the value of one third of said corn and the value of one fourth of said cotton so raised, to all of which ruling of the Court the defendants excepted at the time.

8th. Because the Court erred in holding that the one third of all grain raised and one fourth of all cotton raised on said land during the year 1918 was the true measure of damages for the use and occupation of said land by these said defendant- during the year 1918 to which ruling of the Court the defendants at the time excepted.

9th. Because the court erred in refusing to permit the witnesses J. B. Cole, —— Stanfield and —— Keith who were witnesses for the defendant to testify that the land in controversy in plaintiff's petition had a cash rental value for the year 1918 and that they knew the cash rental value of said land. The Plaintiff ob-
127 jected to the introduction of this evidence and the Court sustained the objection to which the defendants duly excepted at the time.

10th. Because defendants offered to prove by said three witnesses that the land mentioned and described in plaintiff's petition had a cash rental value for the year 1918 and that they knew the rental value of said land, they being acquainted with the rental value of the land in the neighborhood of this land and that the said rental value of said land was $2.00 per acre, to which offer the plaintiff objected and the Court sustained the objection to which the defendants then and there duly excepted.

11th. Because the Court erred in overruling the motion of the defendants herein that the Court instruct the jury to return a verdict in favor of the defendants to which ruling of the court the defendants at the time excepted.

12th. Because the Court erred in directing the jury to return a verdict against these defendants for the sum of $407.41 being the amount of the rents for one third of the corn and one fourth of the cotton raised on said land during the year 1918 to which action of the Court in preemptorily instructing the jury the defendants at the time excepted.

128 13th. Because the Court erred in refusing to instruct the jury to deduct from the amount of rents for 1918 the sum of $75.00 which all parties agreed had been paid by these defendants for the year 1918, to which ruling of the Court the defendants then and there duly excepted.

14th. Because the Court erred in holding and instructing the jury that substantially as follows: That because of the fact that the defendant J. B. Cole, was chairman of the Council of Defense at Porum, in 1918 that it became his duty as such chairman and as an American citizen to conserve the property of this plaintiff during the time that he was engaged in the war and to collect for him the value of one third of all the corn raised on the land in controversy and one fourth of all the cotton and to pay same over to this plaintiff upon his return from the war and for this reason that he had not done so the jury were instructed to return a verdict that was returned, to all of which instruction and holding by the Court the defendants duly excepted.

Wherefore These defendants pray that the verdict herein rendered by the jury shall be set aside and that this Court grant them a new trial.

CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for the Defendants.

129 The above and foregoing instrument is endorsed as follows.

No. 7062. In the District Court of Muskogee County, State of Oklahoma, Eli Bunch, Plaintiff, vs. Cole & Mathews, Defendants. Motion for new trial. District Court, State of Oklahoma, County of Muskogee, ss. Foled Feb. 16, 1920. L. D. Martin, Court Clerk. Crump, de Graffenried & White, Attorneys for Defendants. M. O. O. R.

That thereafter, to wit, and on the 20th day of February, 1920, the court made and entered its order overruling the motions of the plaintiff and the defendants, for new trials herein, and that thereafter, on the 21st day of February, 1920, the court entered its order overruling separately the motion of the plaintiff for a new trial, and the motion of the defendants for a new trial, which said orders so made and entered, were duly spread *or* record upon the journals of said court, and are in the words and figures following, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

T. B. COLE & T. B. MATHEWS, Defendants.

130 *Order Overruling Motion for New Trial.*

Now on this 20th day of February, 1920, came on to be heard the Motion of Defendants to set aside the verdict rendered herein and grant them a new trial and both parties appeared by their attorneys and announced ready on said motion and the Court after hearing the arguments of counsel and being fully advised in the premises is of the opinion that said Motion should be denied.

It is therefore ordered and adjudged by the Court that the Motion of the defendants filed herein for a new trial be, and the same is hereby in all respects overruled. To which ruling of the Court the defendants excepted and in open Court gave notice of their intention to appeal to the Supreme Court of the State of Oklahoma which is ordered by the Court to be noted on the proper minutes of the Court and for good cause shown the defendants are allowed 30 days from this date to serve case made; 10 days allowed plaintiff thereafter to suggest amendments and the same to be settled by the Judge on 5 days' notice by either party.

It is further ordered that the supersedeas bond of the defendants is hereby fixed at the sum of $900.00 and that the defendants be allowed 10 days in which to file said bond and when so filed
131 and approved by the Clerk of this Court, execution in this cause shall be stayed.

It is further ordered by the Court that the case made together with writ of error shall be filed in the Supreme Court within 120 days from this date.

BENJAMIN B. WHEELER,
District Judge.

The above and foregoing instrument is endorsed as follows:

No. 7062. In the District Court of Muskogee County, State of Oklahoma. Eli Bunch, Plaintiff vs. J. B. Cole and T. B. Mathews, Defendants. Order overruling motion for new trial. District Court, State of Oklahoma County of Muskogee, ss. Filed Feb. 21, 1920. L. D. Martin, Court Clerk.

In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELY BUNCH, Plaintiff,

vs.

J. B. COLE and T. B. MATHEWS, Defendants.

Order.

Now on this 20th day of February, 1920, the motion of the plaintiff for a new trial duly comes on to be heard and the plaintiff
132 and the defendants appear by attorneys and the Court does order that the motion of the plaintiff for a new trial be and the same hereby is over ruled to which ruling of the court the plaintiff excepts and in open Court and in the presence of the attorneys for the defendants gives notice of his intention to appeal to the Supreme Court of Oklahoma, from the order over ruling his motion for a new trial and from the final judgment in the cause.

BENJAMIN B. WHEELER,
Judge.

The above and foregoing instrument is endorsed as follows:

No. 7062. Eli Bunch vs. J. B. Cole, et al. Order overruling plaintiff's motion for a new trial. District Court, State of Oklahoma. County of Muskogee, ss. Filed Feb. 21, 1920. L. D. Martin, Court Clerk.

133 That thereafter, to wit, and on the 23rd Day of February, 1920, the defendants filed in the office of the court clerk, their supersedeas bond in the sum of $900.00 which said supersedeas bond was duly approved on said date by the court clerk and spread of record on the bond records of said court, and is in the words and figures following, to wit:

In the District Court of Muskogee County, Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants.

Supersedeas Bond.

Know all men by these presents: That we, J. B. Cole and T. B. Mathews, doing business under the firm name of Cole & Mathews, as principal and Coy Harrison and Geo. M. Neal as sureties acknowl-

edge ourselves to owe and be indebted unto Eli Bunch the plaintiff, in the penal sum of nine hundred ($900.00) dollars to be levied of our goods and chattels, lands and tenements, to be void however upon the following conditions, to-wit:

134 That whereas on the 14th day of February, 1920, in the above entitled cause, judgment was rendered on verdict of a jury in favor of Eli Bunch, the plaintiff and against these defendants in the sum of four hundred seven dollars and forty one ($407.41) cents and,

Whereas the defendants are desirous of appealing from said judgment to the Supreme Court of the State of Oklahoma.

Now, therefore, if the plaintiffs in error will pay the condemnation money and all cost in case the judgment rendered in said cause should be affirmed in whole or in part, then and in that event the above obligation is to be void and of no effect. Otherwise to remain in full force and effect.

J. B. COLE,
T. B. MATHEWS,
Principals.
COY HARRISON,
GEO. M. NEAL,
Sureties.

Approved this the 23rd day of February, 1920.

L. D. MARTIN,
Court Clerk,
By J. H. STALEY,
Deputy.

135 The above and foregoing instrument is endorsed as follows:

No. 7062. In the District Court of Muskogee County, State of Oklahoma. Eli Bunch, Plaintiff, vs. J. B. Cole & T. B. Mathews, Defendants. Supersedeas Bond. District Court, State of Oklahoma, County of Muskogee, Filed Feb. 23, 1920. L. D. Martin, Court Clerk.

136 The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, and all rulings and orders made thereon; all exceptions taken by plaintiff and defendants to such rulings and orders; all the evidence offered, introduced or received upon the trial; all objections and demurrers thereto, the rulings and orders of the Court thereon and exceptions taken by plaintiff and defendants to such rulings and orders, the judgment of the Court and exceptions thereto, and the same is a true and correct statement and complete transcript of all pleadings, motions, evidence, findings, judgments and proceedings in said cause.

137 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants.

Certificate of Attorneys.

We hereby certify that the foregoing case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete case-made.

Witness our hands this 23rd day of February, 1920.

NEFF & NEFF,
HARRY DAVIS,
Attorneys for Plaintiff.
CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

138 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants.

Tender of Case-made.

To the above-named plaintiff and his attorneys of record, Neff & Neff, and Harry G. Davis, Esqs.:

The above and foregoing case-made is hereby tendered to and served upon you and each of you, as a true and correct case-made in the above entitled cause, and as a true and correct statement and complete transcript of all pleadings, motions, orders, evidence, findings, judgments and proceedings in the above entitled cause, this 23 day of February, A. D., 1920.

CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

To said defendants and their attorneys of record the foregoing is tendered to you as a case made for the plaintiff this 23rd day of February 1920.

NEFF & NEFF,
HARRY G. DAVIS,
Attorneys for Plaintiff.

139 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants.

Acceptance of Service.

We, the undersigned, Neff & Neff, and Harry G. Davis, attorneys of record for the above named plaintiff hereby accept and acknowledge due, legal and timely service of the above and foregoing case-made, on us, this 23rd day of February, 1920.

NEFF & NEFF,
HARRY G. DAVIS,
Attorneys for Plaintiff.

We the undesigned attorneys for the defendants acknowledge service of the foregoing case made this 23rd day of February 1920.

CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

140 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants

Stipulation of Attorneys.

We, the undersigned, the attorneys for the plaintiff and defendants, hereby stipulate and agree that the foregoing case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had in said cause, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed, and all the

record upon which the said judgment and journal entry in said cause were made and the same is a full, true, correct and complete case-made; and the plaintiff and defendants waive the right to suggest amendments to said case-made, and hereby consents
141 that the same may be settled immediately and without notice, and hereby joins in the request that the Judge of said Court settle the same and order this case-made certified to the Clerk of the Supreme Court of the State of Oklahoma, and filed according to law, and said plaintiff and defendants hereby waive the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

NEFF & NEFF,
HARRY G. DAVIS,
Attorneys for Plaintiff.
CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants.

142 In the District Court in and for Muskogee County, State of Oklahoma.

No. 7062.

ELI BUNCH, Plaintiff,

vs.

J. B. COLE & T. B. MATHEWS, Defendants.

Certificate of Trial Judge.

Be it remembered, That on this the 25th day of February, A. D., 1920, at one o'clock P. M., at the Court House in the City of Muskogee, County of Muskogee, State of Oklahoma, the above and foregoing case-made was presented to me, Benjamin B. Wheeler, Judge of said Court, before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law, by the parties to said cause, and it appearing to me that said case-made has been duly made and served upon the defendants within the time fixed by the order of this court and in the time and in the manner and form provided by law, that said plaintiff is present by his attorneys, Neff & Neff, and Harry G. Davis, Esquires, and the defendants having waived their right to suggest amendments and requested that this case-made be settled without notice, and said case-made having
143 been examined by me is found to be a true and correct statement and complete transcript and contains all the pleadings, motions, orders, evidence, findings, judgments and proceedings had in said cause, and I hereby allow, certify, settle and sign the same as a true and correct case-made in said case, and hereby order that the Clerk of said Court attest the same with his name and the seal of this Court, and file the same of record, as provided by law.

Witness my hand the date above written.

BENJAMIN B. WHEELER,
Judge of the District Court.

Attest:
[SEAL.] L. D. MARTIN,
Court Clerk.
By W. H. BALLARD,
Deputy.

District Court, State of Oklahoma, County of Muskogee. Filed Feb. 25, 1920.

L. D. MARTIN,
Court Clerk.

144 And thereafter, on March 2nd, 1920, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, February Term, 1920, March 2nd, 1920, Eighth Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that the motion to advance filed in the above cause, be, and the same is hereby overruled.

145 And thereafter, on December 14th, 1920, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1920, December 14th, 1920, First Judicial Day.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that the above cause be advanced and set for the April 1921 term of court.

146 And thereafter, on April 12th, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, April Term, 1921, April 12th, 1921, First Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day the above cause is submitted on the record and briefs filed therein.

147 And thereafter, on May 31st, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, April Term, 1921, May 31st, 1921, Twelfth Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed with instructions to sustain the motion of the defendants for judgment on the pleadings and stipulation of facts, and render judgment in favor of the defendants and against the plaintiff.

Opinion by Miller, J. Harrison, C. J., Johnson, McNeill, Elting and Kennamer, J. J., concur.

148 In the Supreme Court of the State of Oklahoma.

No. 11230.

J. B. COLE and T. B. MATHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Syllabus.

Filed in Supreme Court of Oklahoma, May 31, 1921. William M. Franklin, Clerk.

1. Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided. Section 3783 R. L. Okla. 1910.

2. A tenant in possession of land under a void or voidable lease for one or more years creates a tenancy at will.

3. A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue.

4. Where an Indian leases his restricted land for a cash rental, even though the lease be void and the tenant is permitted to occupy the premises during the term of the lease, such Indian cannot thereafter maintain an action to recover the rental value of the land based on a share of the crop for the year so rented.

5. Where a tenant enters into possession under a void lease and he is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent governs the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises.

Error from the District Court of Muskogee County, Oklahoma.

Benjamin B. Wheeler, Judge.

Action by Eli Bunch against J. B. Cole and T. B. Mathews to Recover Rents on Farming Land. Judgment for the Plaintiff. Defendant's Appeal.

Reversed.

W. J. Crump, R. P. de Graffenried, Myron White, Attorneys for Plaintiffs in Error.

William Neff, L. E. Neff, Harry G. Davis, Attorneys for Defendant in Error.

149 *Opinion of the Court by Miller, J.*

This action was commenced in the District Court of Muskogee County on June 5, 1919 by Eli Bunch as plaintiff against J. B. Cole and T. B. Mathews, defendants, to recover the rental value of certain land belonging to the plaintiff for the years, 1916, 1917 and 1918. The case was tried to a jury and at the close of the trial the court gave a peremptory instruction to the jury to return a verdict in favor of the plaintiff for a certain sum and the court thereupon rendered judgment on the verdict of the jury. The defendants filed a motion for a new trial which was overruled and perfected this appeal. For convenience the parties will be referred to as they appeared in the court below.

The petition states that the plaintiff is a full-blood Cherokee Indian and so enrolled. Plaintiff's claim is for the use of eighty acres of land, forty acres of which is his homestead allotment and the remaining forty acres a part of his surplus allotment. That by reason of certain acts of Congress his allotment was inalienable and he could not lease the homestead for more than one year at a time. That it is bottom land and approximately forty acres was in cultivation and the remaining part in timber and pasture. Defendants had the use of the land during the years of 1916, 1917 and 1918. Part of the cultivated portion of the land was put in cotton and part in corn each year. He states that in May, 1917, he enlisted in the United States Navy and served in the Navy until he was discharged in January 1919. He then asks that he recover $2,625.00 as rents for the years 1916, 1917 and 1918 and exemplary damages in the sum of $1,000.00.

The defendants filed an answer setting up rental contracts for this land for the years 1916, 1917 and 1918 and alleged the rents had been paid under the terms of the contract. To this answer plaintiff filed a verified general denial. It will not be necessary to make any detailed statement of the defense set up in the answer as practically all of defendant's defense has been agreed to in a stipulation of facts entered into by the parties, which is as follows:

150 "It is hereby agreed by and between the plaintiff by his attorneys, Messrs. Neff & Neff, and the defendants by their attorneys, Messrs. Crump, de Graffenried & White, that the following statement of facts are agreed to and may be offered in evidence in this case:

"First. That the plaintiff, Eli Bunch, is a full-blood Cherokee Indian enrolled and recognized as such.

"Second. That he is the allottee of the land described in plaintiff's petition and is now, and has been, the legal owner thereof.

"Third. That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the

plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year 1916, and that these defendants used and occupied said land under said written contract.

"Fourth. That during the year of 1916, to-wit, on July 5th, 1916, the plaintiff again re-rented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917 for a cash rental of $75.00, which said sum was then and there paid by defendants and accepted by the plaintiff in full for the use and occupation of said premises for the year of 1917, and that defendants occupied said land during the year of 1917 as tenants of plaintiff under said contract.

"Fifth. That during the year of 1917, the plaintiff became a soldier of the United States Government and was enlisted in the navy, during said year he was stationed at New York under the control of the Government, and that while in New York these defendants by J. B. Cole wrote to the said plaintiff in regard to leasing the land for the year of 1918, and asked for a rental contract on same and that the plaintiff, Eli Bunch, in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants, by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year 1918, for a cash consideration of $75.00, and that these defendants used and occupied said land during the year 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed that this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings.

NEFF & NEFF,
Attorneys for Plaintiff.
CRUMP, DE GRAFFENRIED & WHITE,
Attorneys for Defendants."

The Defendants then filed the following motion for judgment on the pleadings:

"Comes now the defendants and moves the Court to grant them a judgment on the pleadings together with the stipulation of facts filed herein and of this they pray judgment of the Court."

This was overruled by the Court. Thereafter a trial was
151 had with the results as above stated. The defendants make several assignments of error. Before considering any of them, we wish to observe that the record discloses plaintiff to be a very intelligent Indian, he having had seven years' schooling in the Chilocco Indian School and two years in the common schools before going to Chilocco. It will only be necessary to consider the motion for judgment on the pleadings and stipulation of facts. The motion should have been sustained.

The defendants in error have cited a large number of cases which as we view this case have no application and it will not serve any good purpose to point out the distinguishing features.

The only reason claimed that these leases were void is that they were made prior to the date of the beginning of the lease. The courts have recognized that it was often necessary and to the best interest of the Indian to lease his land prior to the first day of January of the year for which the land is leased.

The plaintiff was satisfied with the rental for the year 1916 of $75.00 and made no complaint. He certainly could not make a complaint two or three years thereafter. In 1916, he was willing to lease his land for the year 1917 for a cash rental of $75.00. The defendants continued in possession and put in their crops, all of this occurring before he enlisted in the Navy and he made no objections to it. He certainly cannot be heard to complain two years later. In July, 1917, he instructed the defendants to make arrangements with his mother for the leasing of the land for 1918. Under this instruction they did arrange for the leasing of the land and on the same terms that he had been willing to lease it for the preceding years. They paid the cash rental in advance as had been their custom and it does not appear that any undue advantage was taken. If the lease was void so that he could have demanded possession of the premises but failing to demand possession he waived that right, therefore a tenancy at will existed.

This was held in Peters v. Holder, 40 Okla. 93, 136 Pac. 400:

152 "A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent be paid, the tenancy becomes one from year to year. Tate v. Gaines, 25 Okla. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc. 1031.

Section 3783, Revised Laws of Oklahoma, 1910, provides:

"Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided."

In Tate v. Gaines, 25 Okla. 141, 105 Pac. 193, Dunn, J., quotes approvingly from Cunningham v. Holton, 55 Mo. 33, which court defines a tenancy at will as follows:

"A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as

both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words."

Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease the terms of the lease stipulating the amount of rent to be paid shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for.

Evans v. Winona Lumber Co., 16 N. W. 404; Laughran v. Smith, 75 N. Y. 205; Thurber v. Dwyer, 10 R. I. 355; Larkins v. Avery, 23 Conn. 304; Morrill v. Mackman, 24 Mich. 279.

If the plaintiff had been seeking to obtain possession of the premises because the lease was void a very different question would be presented here. It is urged by the plaintiff that he was in the Navy from May, 1917, until the end of the year 1918. This is all true and we believe that every protection should be given the boys who responded to the call of their country.

If we say the acts of an agent duly appointed by a person while they were in the service of either the army or navy may be ignored at will, it will open the door for all kinds of fraud. Such a rule would make it unsafe for any person to deal either with the soldier or his agent in any way. The result would be that all of the real estate of the soldier would remain idle and he would not re-
153 ceive any income whatever from it. If he rented the land for cash rent, he could rescind the cash payment clause in the contract and demand that the tenant account on a basis of a share of the crop. If he rented it for a share of the crop and the tenant delivered the agreed share as per the contract, he could then say the rent received was not enough and that it was worth a certain sum on a cash basis and demand settlement on that basis. If any such rule had been established before the war, or if it was known such a rule would thereafter be established, it would have been unsafe for any person to contract to rent land belonging to a soldier or belonging to a person that by any possible means might become a soldier. As a result millions of acres would have been uncultivated at the very time the products of the soil were most needed.

The plaintiff contends:

"That where the Chairman of the Council of Defense took charge of the land of a soldier under contracts conceded to be void, and rented the same out, he is chargeable as a trustee for what he collected; that the chairman of the Council of Defense cannot be allowed to deny that the land was actually worth what he received for its use;"

This has no application for this plaintiff specifically designated his mother as his agent to attend to the leasing of the land for him. The chairman of the Council of Defense had nothing to do with it.

The plaintiff makes a further statement in his brief (brief of defendant in error) that the lease was void for the reason that Cole and Matthews sublet the land to others parties. This might be

grounds to dispossess the persons in actual possession of the premises, but does not in any way affect the rights of the parties in this action.

The judgment of the trial court is reversed with instructions to sustain the motion of the defendants for judgment on the pleadings and stipulation of facts, and render judgment in favor of the defendant and against the plaintiff.

Harrison, C. J., Johnson, McNeill, Elting and Kennamer, J. J., concur.

154 In the Supreme Court of the State of Oklahoma.

No. 11230.

J. B. COLE and T. B. MATTHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Petition for Rehearing.

Filed in Supreme Court of Oklahoma, Jun. 14, 1921. William M. Franklin, Clerk.

The defendant in error moves the court to grant a rehearing upon the following grounds, to-wit:

As will be pointed out in the latter part of this petition the decision nullifies all of the laws of the United States, prohibiting the taking of leases from full-blood Indians and the decision is not good law for the reason that it holds that effect can be given to the terms of a contract made in violation of the prohibition of a positive law by a person not sui juris. But before taking up the legal aspects, attention is called to the injustice of the decision rendered in this case. The facts are not stated in the opinion.

The decision in this case calls to mind the words of Kipling's poem:

"For it's Tommy this, an' Tommy that, an'
'Tommy wait outside';
But it's 'Special train for Atkins' when
the trooper's on the tide,
O it's 'Thin red line of 'eroes' when the
drums begin to roll.

For it's Tommy this, an' Tommy that, and'
'Chuck him out, the brute!'
But it's 'Saviour of 'is country', when the
guns begin to shoot."

Only four years ago men were urged to enlist to save our country. They were told, their service would never be forgotten by a grateful people and those staying behind would look after
155 their property while away. The war has been over a period of two years and forgotten now are the promises made and

the services rendered. Eli Bunch enlisted at the opening of the war. J. B. Cole remained behind. J. B. Cole endured none of the hardships of the war. He was chairman of the Council of Defense at Porum. When public meetings were held, he presided. His name appeared in the newspapers as the first of the public spirited citizens of Porum, who was sacrificing money and time to the winning of the war.

As the war went on, prices went up again and again. J. B. Cole rented out the land of the absent soldiers. He rented out the land of Eli Bunch for 1918 and 1918, while Eli Bunch was away in the war. The opinion says, "The defendants continued in possession and put in their crops." This is an error, the defendants put in no crops, they spent no money for seeds, they only rented the land to others. J. B. Cole collected without labor, for the two years, the sum of $1,274.75. Of this amount Eli Bunch received $75.00 and his mother $75.00 more. The contracts between Eli Bunch the absent soldier, and J. B. Cole, the patriotic chairman of the Council of Defense at Porum, are conceded to be void. J. B. Cole never had a valid contract. Therefore to award to the absent soldier the actual proceeds of his land while he was away, would not require the setting aside of any valid contract, while on the contrary to allow the chairman of the Council of Defense to retain the $1,124.75 profit, requires that a contract prohibited by the law of the United States, made by a person who under such laws, was not sui juris, be upheld.

In 1921 the case of Eli Bunch, the absent soldier, against J. B. Cole, the chairman of the Council of Defense, who had made 750% profit from the renting out of the land of an absent soldier, possession of which had been obtained under an illegal contract, came
156 on for decision. Forgotten now are the promises and the pledges made when the soldiers went away. Forgotten now are the hardships they underwent. The fact that a profit of 750% was made by the chairman of the Council of Defense through his renting out of the property of an absent soldier is not deemed worthy of mention in the opinion, but it is said, "In July 1917, he instructed the defendant to make arrangements with his mother for the leasing of the land for 1918." Who else could he get to act for him. Eli Bunch was thousands of miles away. His mother was old, she was illiterate, she was an ignorant full-blood Indian. She did not stand on an equal footing with the honorable chairman of the Council of Defense. It does not appear that there was anyone else with whom Eli Bunch could leave the land.

The opinion says, "And it does not appear that any undue advantage was taken." If this be true we are at loss to know of what "undue advantage" could consist. In the year 1917 in which the chairman of the Council of Defense contracted to pay $75.00 to this old, full-blood Indian for the use of her son's land for 1918, he collected for the use of the land the sum of $890.40. In other words he contracted to pay for the use of the land for 1918 only one-twelfth of what he actually collected for its use in 1917. We presume that if he had contracted to pay as much as one-sixth of the amount received, his princely generosity would have been mentioned

and if he had contracted to pay as much as one-third, his generosity would have been regarded as unbelievable.

But it is said that Eli Bunch was satisfied to take $75.00 for the use of his land in 1916 under a contract made in 1915 and it is therefore argued that $75.00 per year must be deemed the fair price for the use of the land for 1917 and 1918. This argument
157 wholly ignores the fact that the years 1917 and 1918 were a period of war prices and the period in which everything brought a great deal more than it did during the period prior thereto. Corn and cotton sold for several times as much, during those years, as in prior years.

The opinion contains the following:

"Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease the terms of the lease stipulating the amount of rent to be paid shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for.

Evans v. Winona Lumber Co. 16 N. W. 404; Laughran v. Smith, 75 N. Y. 205; Thurber v. Dwyer, 10 R. I. 355; Larkins v. Avery, 23 Conn. 304; Morrill v. Mackman, 24 Mich. 279."

The cases cited in no way sustain the proposition of law stated. It is the general rule that where the statutes of frauds require a lease to be in writing and an oral lease is made, which because of the statutes of frauds cannot be enforced, and possession is taken under the oral lease, the terms of the oral lease govern, except as to period of the renting. But no such rule applies as to a void lease made in violation of the prohibition of law. No such rule applies in the case of a lease made by a person who is a minor or incompetent or for any other reason not sui juris. In the case of an oral lease both parties are capable at the time of making a valid lease. If they had made a lease in writing it would be valid and enforcible. They had the right to contract. Oral contracts, where the statutes of frauds requires a writing, have never been regarded as void in the sense that they are prohibited by law.

At the time Eli Bunch made the lease in controversy the law prohibited him from making such a lease at all. It prohibited J. B. Cole from taking such a lease from him. This was not a case of two persons, both competent to contract, making an oral lease when the law required a writing, but it was the case of a lease made in writing which the law prohibited from being made at all.
158 The general rule is that where a contract is prohibited by law, none of its terms can be regarded for any purpose and where one of the persons making it is not sui juris, the other party can claim no rights from the fact that it was made.

It is held by the court in this case that a lease prohibited by law is void, but if the lessee gets possession, he need only pay the rent stipulated by the lease. A person therefore can take a ten year lease from a full-blood Cherokee Indian upon 160 acres of bottom land, worth $1,000.00 per year and contract to pay $10.00 at the end of the ten years or contract to pay $1.00 per year and if he gets posses-

sion of the land, he cannot be required to pay more. If this be the law, any person can safely take such leases and the effect of the holding is, to indirectly enforce the terms of the lease. The holding that any term of an illegal contract can be considered for any purpose, is contrary to the decided cases upon the question. The general rule is stated as follows:

"The contract is wholly void and incapable of ratification, and must be entirely ignored, in dealing with the business transactions between the parties, precisely as though no such writing had ever existed."

Gennert v. Westner, 31 Atl. 609 N. J.

To the same effect are, Day v. McAllister, 15 Gray 433, Winfield v. Dodge, 7 N. W. 906 Mich., State v. Ryan, 8 Atl. 293 N. J.

It was said by the Supreme Court of Wisconsin in a lease case:

"The written instrument offered in evidence, as we have said, was void. It was not competent to prove the contract by it. What, then, was the contract as to the payment of rent? This must be determined without regard to the terms of the written agreement. This logically follows from the fact that that agreement was void, and could not be resorted to to determine the contract of the parties."

Vinz v. Beatty, 21 N. W. 787.

Regarding the effect of a void lease the Supreme Court of Iowa in an opinion said:

"But something more than mere occupation of the premises would be necessary to the ratification of the lease. That might render the tenant liable under an implied promise for the quantum meruit, but not for the rent stipulated in the lease according to its terms."

McIntosh v. Lee, 10 N. W. 895.

159 We have not been able to find any case holding that the terms of a void lease, void because contrary to statute or public policy, can be considered for any purpose.

Further, the opinion in this case is squarely contrary to the opinion in the case of Mann v. Brady, XIV, A. P. C., 368, in which the final opinion was filed on March 8, 1921, and was written by Mr. Justice Miller. The case evidently had received the careful consideration of the Court, as two opinions were filed in the case. If the opinion in this case is right then the opinion in Mann v. Brady is wrong and ought to be overruled. The sole difference between the two cases is that in Mann v. Brady the contract considered was one for the sale of the restricted land of a full-blood Indian and the contract in this case is one for the leasing of the restricted land of a full-blood Indian. The opinion in that case is long, but the following extracts from the opinion are sufficient to show the difference between the doctrine in that case and the holding in this case:

"Referring to plaintiff's first contention: A contract made by a Creek Indian for the sale of his restricted land is void and cannot be

enforced. The policy of the government is to exercise a protecting control over the Indian and his lands, and any contract made in disregard of that policy which cannot be carried to full fruition because of such governmental protection, is void.

"Counsel cites other authorities along the same line as those above referred to, but these authorities are not applicable to the case before us. This was an entire and indivisible contract made in total disregard of the policy of the government of the United States in dealing with the Indians as wards of the government.

The government has taken the attitude of a guardian to protect the Indian in the possession of the lands allotted to him. This was done on the theory that the Indian was not the equal of the white man in handling business and financial affairs and that he would be the easy prey of the white man. This guardianship control is very much in the nature of a guardianship over a person who is a minor and incapable of handling his own financial and business affairs. This being the policy of the government, he who deals with the Indian and disregards that policy does so at his peril.

If the contract were between two parties of supposed equal mental attainment and business sagacity, where no law restricted them in their right to contract, except the law applicable to mankind, then a different rule of law would apply. But where an Indian
160 who is under guardianship control of the government and because of his lack of business sagacity the government establishes a policy of protecting him, a court of justice should be imbued with the full spirit of that policy and refuse its aid in the enforcement of a contract made in total disregard of such policy.

It would be folly to find a purchaser ready, able, and willing to buy the land of an Indian when the government had already decreed by its restrictions that the land could not be alienated. A contract, for a real estate agent's commission, made with an Indian, to find a purchaser to buy any part of his restricted lands, is in violation of the policy of the government in dealing with the Indians and cannot be enforced."

"Those contracts are unlawful which are: First, contrary to an express provision of law; second, contrary to the policy of express law, though not expressly prohibited." Section 972 of the Revised Laws of Oklahoma, 1910.

"By Act of Cong. June 28, 1898, c. 517 para. 29, 30 Stat. 507, it is provided: 'That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale heretofore provided, shall be null and void.' Lewis et al. v. Clements, 21 Okla. 167, 95 Pac. 769; Light v. Conover, 10 Okla. 732, 63 Pac. 966; Kelly v. Courter et al., 1 Okla. 277, 30 Pac. 372."

"That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void." U. S. Statutes at Large, vol. 30, chap. 517, p. 507.

The case of Mandler v. Rains, 70 Oklahoma, 174 Pac. 240, is worthy of consideration:

'Where W., a full-blood Indian, makes a contract with M. wherein he agrees to pay M. all money in excess of a certain sum for which M. may sell his interest in an inherited allotment, and such contract is withheld from the knowledge of the county court who has jurisdiction to approve such sale under Act of Cong. May 27, 1908, c. 199, 35 Stat. 312, which contract had the effect, if not the purpose, of securing the approval of the county court to a conveyance for a less consideration than would have secured the approval of the court had it been aware of the contract, this would render such contract void as between the parties, and W. would have a right to recover any sums of money paid M. under said contract, whether paid voluntarily or otherwise. * * *

'In other words, the instruction told the jury that, if they should find that the contract was made in good faith with the sole and only purpose of compensating Mandler for his trouble in securing a purchaser of said land, then the jury could not find for the plaintiff for the sum sued for. We think the instruction was more favorable to the defendant than the facts under the circumstances warrant. To hold otherwise would merely nullify the act of Congress of May 27, 1908, c. 199, 35 Stat. 315, which is as follows: "That the death of any allottee of the Five Civilized Tribes, shall operate to remove all restrictions upon the alienation of the said allottee's land; provided, that no conveyance of any interest of any full-blood heir in such land shall be valid, unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee.' This act of Congress was intended to protect the very class of persons among which the plaintiff is numbered, and, if it can be abrogated and set aside by an outside contract withheld from the knowledge of
161 the county court as in the instant case, then it is absolutely worthless and would merely be as a 'sounding cymbal of tinkling brass.' It is our opinion that if said contract was made, even though in good faith, and the knowledge thereof was withheld from the court in order to secure its approval of the conveyance which the court would not approve with full knowledge of said contract, such act was a fraud upon the court, and said contract would be void and of no effect. The jury having found that said contract was made for the fraudulent purpose of securing the approval of the county court to the conveyance, and to circumvent the county court in its efforts to have what it conceived to be a fair consideration paid for said interest, and the evidence in the case reasonably tending to support said finding, disposes of this proposition, as well as the other assignment of error urged, to the effect that even though said contract was void, the payment by Washington to Mandler, having been voluntarily made, could not be by him recovered. It is true that as a general proposition of law a party to an illegal contract cannot come into court and ask to be relieved therefrom. The parties being in pari delicto, the court leaves them where it finds them. However, there are well-settled exceptions to this rule: (1) Where public policy requires the intervention of the court; (2) where the parties are not

in pari delicto; (3) where the law which makes the agreement unlawful was intended for the special protection of the party seeking relief. 9 Cyc. 550.

'Although the parties are in pari delicto, yet the court may interfere and grant relief at the suit of one of them where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with the defendant. Here the guilt of the parties is not considered as equal to the higher right of the public, and the guilty party to whom the relief is granted is simply the instrument by which the public is served. Thus it has been held that a grantor who has executed a deed pursuant to a lottery transaction may, in ejectment brought by him, set up the illegality of the conveyance, notwithstanding he is in pari delicto, as the statute for the suppression of lotteries, which declares such a conveyance void, can only be enforced by permitting the grantor to claim the invalidity of the transfer and obtain an annulment of the conveyance. Wooden v. Shotwell, 24 N. J. Law, 789.

'9 Cyc. p. 552, lays down the following rule: "Where One Party Is Protected by the Law.—The complaining party is especially protected by the law where the agreement is not illegal per se, but is merely prohibited, and the prohibition was intended for his protection, and in such case, not being in pari delicto, he is entitled to relief." Tootle v. Berkley, 57 Kan. 111, 45 Pac. 77; Mason v. McLeod, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327.

'In case of Smart v. White, 73 Me. 332, 40 Am. Rep. 356, the court discussed the right of a pensioner who had been assisted by the overseer of the poor of the town in securing her pension under an agreement that when she received the same the same should be applied on her indebtedness to the city for her support. She did receive it and turn it over to the overseer for the benefit of the city, then afterwards brought suit to recover this back. The court, in discussing her right to recover back the sum voluntarily paid, says: "But the plaintiff stands in a different attitude. If her pension was taken from her through a contract declared to be void by the
162 statute, she can have its restoration. She would be entitled to recover it back, even had she known the law, and a fortiori entitled, not knowing it. The parties do not stand in pari delicto. The penalty of the statute is leveled at him, and not at her. The punishment is to be inflicted upon the taker and not upon the giver. She is to be protected, not punished. Her ignorance of the law, or her folly, if not ignorant of it, is excusable; but his is not. He commits a wrong; she does not. She cannot defraud herself. The statute would be nullified by a different interpretation.'

'And so, in the instant case, to hold that because the money was paid by the plaintiff voluntarily to the defendant under a contract which had the effect, if not the purpose of securing the approval of the county court to a conveyance divesting plaintiff of his property for a less consideration than the court would have approved had it been aware of all the conditions surrounding the transaction, would defeat the very purpose of the law and render powerless the

court to afford the protection to this class of restricted Indians which under the law it was charged with this responsibility. It has been held by this court and the Supreme Court of the United States that the very purpose of section 9 of the act of May 27, 1908, was to prevent Indians from making improvident sales and to protect them against their own incompetency by providing that no conveyance of an interest in inherited lands by such full-blood Indians would be valid unless approved in accordance with such act. The contract in question between plaintiff and defendant affected plaintiff's interest in inherited land, and this interest could not be conveyed by the plaintiff without the approval of the county court; which court had been constituted a governmental agent for such purpose in such cases, and, where said contract so affecting such interest was withheld from the knowledge of such governmental agency as was done in the instant case, it would necessarily render said contract void as between the parties and give the plaintiff the right to recover any sums of money paid under said contract, whether paid voluntarily or otherwise. The record in this case discloses that the county court would not have approved the deed in question if it had been apprised of such contract, because it had refused to approve the conveyance for the identical consideration which the Indian was receiving in the instant case on the ground that the consideration was inadequate.

"We therefore, hold that said contract is void and of no effect. It necessarily follows that this cause should be in all things affirmed, and is so ordered." Mandler v. Rains, 70 Oklahoma, 174 Pac. 240.

"All contracts or agreements having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void. * * *" Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17.

This court had under consideration a contract for the sale of restricted Indian lands in the case of Howard v. Farrer, 28 Okla. 490, 114 Pac. 695, in which the court held:

'By reason of Act. Cong. June 28, 1898, c. 517 sec. 29, 30 Stat., p. 507, and by Act. Cong. July 1, 1902 c. 1362, 32 Stat. p. 642, a sale by a full-blood Choctaw Indian to a white man of a portion of her allotment before the removal of restrictions upon her power to alienate and an agreement to convey same when her re-
163 strictions are removed is void; and notes executed by such Indian to the purchaser for the purpose of indemnifying him against loss in the event she fails to convey said land after her restrictions are removed are also void; and recovery thereon cannot be had although the purchaser paid the purchase price of the land at the time of the agreement of sale. * * *

"By one of these instructions the jury was told that if they should find from the testimony in the case that the notes sued upon

were contracts looking to sale of Indian land, and were made before the restrictions had been removed from same, in that event the notes were made in violation of the law and against public policy and therefore void; and the verdict should be in favor of defendants. * * *

"'All contracts or agreements having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void. * * *'"

In conclusion it may be said that the opinion, as rendered, does great injustice to a returned soldier and upholds a transaction which ought to receive the condemnation of all patriotic persons. The opinion, as rendered, nullifies the acts of Congress relating to the leasing of lands of full-blood Indians.

A rehearing should be granted. Respectfully submitted.

NEFF & NEFF,
HARRY G. DAVIS,
Attorneys for Defendant in Error.

164 And thereafter, on June 28th, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause.

Supreme Court, June Term, 1921, June 28th, 1921, Seventh Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that defendant in error be granted 20 days to file brief on rehearing in the above cause and oral argument is hereby denied.

165 In the Supreme Court of the State of Oklahoma.

No. 11230.

J. B. COLE and T. B. MATTHEWS, Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

Brief in Support of Petition for Rehearing.

Filed in Supreme Court of Oklahoma Jul. 18, 1921. William M. Franklin, Clerk.

We have been given leave by this court to file a brief in support of a petition for rehearing. Upon examination of the original briefs and the cases cited in the petition for rehearing we find that the issues in the case are clearly presented and fully discussed, and we desire only to call the Court's attention to what we consider the controlling principle that should govern this case, and to discuss a few cases which we think support that principle.

It will be remembered that the plaintiff, Eli Bunch, is a full blood Creek Indian and that the land in controversy is his homestead and surplus allotment of eighty (80) acres, and that it is conceded by defendants that plaintiff was in actual military service of the United States during the years 1917 and 1918. It is further conceded that the leases executed by him and by his mother, as his purported agent, were null and void under the acts of Congress relative to the leasing of allotted land. This court in its opinion recognizes that said leases executed by the plaintiff to the defendant are void, but holds that since defendants went into possession of the land under the leases that the rental provided for in the leases fixes the amount of recovery to which the plaintiff is entitled and for which defendants are liable. In support of this holding the court cites the following cases——

166 Evans v. Winona Lumber Co., 16 N. W. 404;
Laughran v. Smith, 75 N. Y. 205;
Thurber v. Dwyer, 10 R. I. 355;
Larkins v. Avery, 23 Conn. 304;
Morrill v. Mackman, 24 Mich. 279.

We have no fault to find with the rule announced in those cases but we respectfully contend and insist that it has no application to a lease that is void because not authorized by the laws of the United States, but is prohibited because it is contrary to the public policy of the United States in the exercise of its guardianship and protecting care over full blood Indians who are recognized through all the decisions as a dependent people.

The rules of law that are applicable to white people as to contracts made by them governing their real estate are not applicable to full blood Indians. It has been repeatedly recognized by this court and by the Federal courts that no rights whatever can take root in a

grow out of contracts made by full blood Indians that are contrary either to an expressed statute or the public policy of the United States in dealing with these wards of the Government.

This and the Federal courts have held in many cases that a conveyance executed by an Indian before title rests in him is void and that the subsequent acquisition of title will not vest title in his grantee by estoppel. The general rule is that a conveyance with warranty estops the grantor to deny the grantee's title when he afterwards becomes the owner of the land assumed to be granted, does not apply to such cases. In the case of Starr vs. Long Jim, 227 U. S. 613, 33 S. Ct. 358, 57 U. S. (L. ed.) 670, the court said:

"As to the effect of the warranty upon the after-acquired title, while the general rule is that a conveyance with warranty estops the grantor, when he afterwards becomes the owner of the land assumed to be granted, to deny the grantee's title (Bigelow, Estoppel, 2d ed. p. 324, etc.), it is well settled that the doctrine does not apply to the case of a conveyance made by one non sui juris, or that is contrary to public policy or statutory prohibition. Bank of America v. Banks, 101 U. S. 240, 247, 25 L. ed. 850, 853; Doe ex dem. Chandler v. Ford, 3 Ad. & El. 649, 5 Nev. & M. 209, 1 H. & W. 378, 5 L. J. K. B. N. S. 25; Den ex dem. Wooden v. Shotwell, 24 N. J. L. 789; Connor v. McMurray, 2 Allen, 202, 204; Doyle v. Coburn, 6 Allen, 71, 72;
167 Me-am v. Boston, C. & F. R. Co. 1- Mass. 241, 244; Brick v. Campbell, 122 N. Y. 337, 346, 10 L. R. A. 259, 25 N. E. 493; Kennedy v. M'Cartney, 4 Port. (Ala.) 141, 158.

"Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by the way of estoppel."

See also Mullins v. Simmons, 234 U. S. 192, 34 S. Ct. 857, 58 U. S. (L. ed.) 1274; Briggs v. Sample, 43 Fed. 102, 10 L. R. A. 132; Whitmire v. Levine — Oklahoma —, 193 Pac. 884.

This principle is further illustrated by the case of Murrow Indian Orphans Home v. McClendon, 166 Pac. 1101, and Cravens et al. v. Amos et al. — Oklahoma —, 166 Pac. 140. In the former case it was held that the champarty statutes of this state have no application to conveyances made by restricted Indian, and no state statute can be set up to impair or restrict the rights granted or protected by Federal laws. The reasons upon which this salutary rule is based is ably stated by this court in the opinion delivered by Mr. Justice Brett, as follows:

"The purpose of Congress in placing the restrictions upon the Indian's land was to put the title where the Indian could not interfere with it, or divest himself of it, and to insure that it would remain in him, under the control of Congress and the constituted authorities. But if our statute on champerty applies to these lands, then that pur-

pose has, in a large measure, failed. For then the Indian can put some one in possession under a void deed, as in the case at bar, and then when Congress removes his restrictions, and turns over to him what it intended should be an untainted title, this statute confronts him, and says, Any deed you make is, as against the one in possession, void until you go into court and remove this cloud that you have placed upon your title, and regain the possession that you parted with, through profligance and a void deed. Congress never contemplated that the courts, or any one else, would have to be called to its assistance to enable the owner of these restricted lands to convey by perfect title, when restrictions were removed.

168 "What other purpose could Congress have had in placing the restrictions upon these lands, except to protect the Indian against his own acts? and if our champerty statute applies to these lands, then we repeat that the purpose of Congress has, in a large measure, failed. For upon the removal of restrictions, instead of having the clear and perfect title that Congress intended to preserve for him, he only has a title that he may clear up through the courts, before he can convey anything, as against the one in possession, under a void deed, made in contravention of the act of Congress, and which unless aided by our champerty statute, would be nothing more than a scrap of waste paper. We know that Congress reserved the right to control these lands, and to enact the laws affecting their conveyance. And our Legislature has never, by a single act, attempted to divest Congress of this control. And this champerty statute has no application, and was intended to have no application, to the restricted lands of an Indian. And the holding in Miller v. Fryer, et — Okl. 145, 128 Pac. 713, Ruby v. Nunn, 37 Okl. 389, 132 Pac. 128, and Okl. Trust Co. v. Stein et al., 39 Okl. 756, 136 Pac. 746, that this statute does apply to the restricted lands of an Indian is expressly overruled."

169 In Cravens et al. v Amos et al., supra, this court had before it for consideration and decision the applicability of the Occupying Claimants' article of Code of Civil Procedure, Chapter 60, Art. 15, Revised Laws 1910, 4933-4939, providing for compensation for valuable and permanent improvements made and taxes paid by an occupying claimant, and held that such provision was not enforceable against the owners of the land who were full blood Indian heirs of the allottee, and who under Federal laws were not authorized to convey their interest therein without the approval of the court having jurisdiction of the settlement of the estate of the deceased allottee. The court in an opinion by Mr. Justice Miley among other things said——

"We do not believe that any construction can be given the Occupying Claimants article which would give it any force or effect without in effect nullifying the restrictions imposed by Congress on the land. The acts of Congress on the subject are, of course, paramount, and conflicting statutes must give way."

In the case of Walker et al. v. Brown, 141 Pac. 681, this court in an opinion by Mr. Justice Kane made the following pertinent observation relative to the policy of the National Congress—

"This court has repeatedly held that acts of Congress supplant the laws of Oklahoma in relation to Indians; that certain state laws which are applicable to every other citizen are not in force as against or pertaining to the Indians of the Five Civilized Tribes, and that we have here, respecting some matters, two classes of citizens and two legislative sovereignties. Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755; Kirkpatrick v. Burgess, 29 Okl. 121, 116 Pac. 764; Wilson v. Morton et al., 29 Okl. 745, 119 Pac. 213. The Congress in the exercise of this power has undertaken to legislate for the Indians along lines which it deems will subserve their best interests, and it is not within the province of the court to inquire whether it performs this duty well or ill."

Now applying the principle enunciated by the above cases which are illustrative of the vast number of cases announcing the same principle of law, it is apparent that one of the primary considerations in determining the rights of restricted Indian allottees is to ascertain the Federal law or policy and then to give it full
170 force and effect. As has been stated in effect in some of the above cases the courts are not authorized to give such construction to the acts of Congress or to apply state statutes or rules of law applicable to others than the class of citizens protected by the Federal Government, for by doing so would permit an indirect accomplishment of that which is prohibited to be done directly. Now in the instant case it is conceded that under the acts of Congress and the policy of the Federal Government relative to restricted full blood Indians, such as the complainant in this case, that the leases herein involved are absolutely void and contrary to the policy of the Federal Government. The object sought to be accomplished by the lessee was to cultivate complainant's land for profit and to secure possession thereof for such purpose. The National Congress has put its seal of disapproval upon such transactions, and to permit a lessee who has secured possession pursuant to a *voild* lease such lease being taken and possession held contrary to the public policy of the government, and to have their liability fixed by the terms of the lease, certainly permits such lessees to circumvent the law and to do indirectly what is expressly prohibited. If the rule announced by this court is permitted to stand all that a designing person needs to do to avoid and circumvent *rhw* policy of the Federal Government and to impose upon one of its wards is to induce him to execute a void lease, secure possession thereunder, and only be liable for the rental stipulated in the void contract. If let into possession under such a void lease the lessee is permitted to derive the benefits that he would have if the lease had been valid, and it seems to us that this would complete frustrate governmental policy. Otherwise the lessee could take a void lease upon valuable agricultural land, stipulate in the lease that he was only to pay a nominal consideration for the use of the premises and then when sued for the fair rental value, or the actual rents received by him, could set up the stipulation as to the amount of rent in his void lease as the measure of his liability. This would certainly give him a valuable

right and protection based upon a void instrument secured contrary to the public policy of the National Government.

171 We are not aware of any case that holds that those dealing with these deponent wards of the National Government secure any rights whatever from an instrument taken in direct violation of an expressed statutory provision or its public policy. In the case of Apple et al. v. Westheimer & Daube, 155 Pac. 623, the contention was made by certain defendants holding under a void lease that by reason of their actual possession at the time plaintiff purchased land that they had certain "rights and equities." In denying this contention this court said—

"In a case of this kind, under the facts, such argument is not only inconsistent, but has neither length or breadth. Of the many phases of Indian lease questions decided by this court, not one can be found supporting defendants' view. Defendants' possession, right, and equities, as they designate them, in order to be such in fact, must depend on some prior, lawful, actual, contractual relations, or at least grow out of some act or relation not unlawful; otherwise, by circumvention, an object could be accomplished by indirection which could not be accomplished by direction. One could be guilty of the most flagrant violation of the inhibition imposed in reference to leasing full-blood Indian lands, and by artifice accomplish just what Congress intended to forbid. Whatever may be the application of the principle for which counsel contend as applied to other and not full-blood Indian leases, as herein, is not necessary for decision; but we feel firmly such a position here is untenable. When called to account, defendants cannot love another for the purpose of escaping the penalty of law, and at the same time divorce themselves from the union they have voluntarily entered, enjoyed, and maintained, and in this connection there is no question but what the plaintiffs may assail the invalidity of the lease on which defendants must win or lose."

We have been unable to find and do not think there are any cases directly in point, that is which determine the measure of damages for which the wrongful occupant of land is liable who comes into possession under a void Indian lease. But we do not think there is any case holding that such tenant is liable only for the amount of the rent specified in the void lease, but we are firmly convinced that the rule announced by this court in its opinion is not and should not be applicable to contracts taken by designing persons contrary to the law and public policy. For the reasons stated we respectfully ask this court to grant the plaintiff,

172 defendant in error, a new hearing.

Respectfully Submitted,

NEFF & NEFF,
RAINEY & FLYNN,
Attorneys for Defendant in Error.

173 And thereafter, on July 26th, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, June Term, 1921, July 26th, 1921, Eleventh Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that plaintiff in error be requested to file response to petition for rehearing within 10 days, in the above cause.

174 And thereafter, on July 30, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court Proceedings.

11230.

J. B. COLE et al., Plaintiff in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this July 30 1921 it is ordered by the court that plaintiff in error be given until Sept. 5 1921 to file response to petition for rehearing in the above cause.

175 And thereafter, on February 7th 1922, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1921, February 7th, 1922, Tenth Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

176 And thereafter, on February 14th 1922, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, February Term, 1922, February 14th, 1922, First Judicial Day.

11230.

J. B. COLE et al., Plaintiffs in Error,

vs.

ELI BUNCH, Defendant in Error.

And now on this day it is ordered by the court that the mandate be stayed in the above cause pending application for appeal to the United States Supreme Court.

177 *Certificate.*

In the Supreme Court of the State of Oklahoma.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 176 pages, numbered from 1 to 176 inclusive, is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of J. B. Cole, et al., plaintiffs in error, vs. Eli Bunch, Defendant in error, No. 11230, as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, Oklahoma, this the 28th day of March, A. D. 1922.

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

Endorsed on cover: File No. 28,827. Oklahoma Supreme Court. Term No. 872. Eli Bunch, plaintiff in error, vs. J. B. Cole and T. B. Mathews. Filed April 12th, 1922. File No. 28,827.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

ELI BUNCH, ***Petitioner,***

vs.

J. B. COLE AND T. B. MATHEWS, ***Respondents.***

PETITION FOR WRIT OF *CERTIORARI.*

To The Honorable The Supreme Court of the United States:

Your petitioner, Eli Bunch, most respectfully shows to this Honorable Court:

That on the 15th day of June, 1919, the petitioner brought in the District Court of Muskogee County, Oklahoma, an action against J. B. Cole and T. B. Mathews to recover from them the amounts collected by them from third persons for the rent of his land during the period of 1917 and 1918, when he was in the active military service of the United States, J. B. Cole, the principal defendant, having been chairman of the Council of Defense at Porum, Oklahoma, dur-

ing the same period. There was no dispute as to the facts. The plaintiff was an enrolled full-blood Cherokee Indian, who, under the Act approved the 27th of May, 1908, 35 Statutes 312, had only a limited capacity to make leases of his allotted land. Section 5 of that act provided in part:

> "Also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

It appeared that during the years 1917 and 1918, the defendants had rented out the allotted land of the plaintiff and had collected the rents therefor in the sum of $1274.75, and that the defendants had paid the plaintiff $75.00 on account of the rent of the land for 1917 and the plaintiff's mother $75.00 on account of the rent of the land for 1918. The defendants set up as a defense that they had the land under a lease made on July 5, 1916, by the plaintiff to commence on January 1, 1917, and under a lease made on July 28, 1917, by the mother of the plaintiff to commence on January 1, 1918; that it was stipulated by these leases that the plaintiff should receive $75.00 for 1917 and his mother $75.00 for 1918, and that these amounts had been paid and that such leases and such payments constituted a complete defense to the action by virtue chiefly of section 3783, Revised Laws of Oklahoma, 1910, governing tenancies.

The plaintiff contended that the leases were void under the laws of the United States and that the defendants could acquire no rights under such leases

and that they must account to him for the amounts they collected for the use of his land, and the plaintiff further contended that by reason of his being in the military service of the United States he was not in a position to look after his own land; that someone else must necessarily look after the land while he was away in the military service, and that the statutes of the United States, pursuant to which he was in the United States military service by necessary implication, gave him the right to require any person who looked after his property in his absence to deal fairly with him and prohibited such persons from taking advantage of unconscionable contracts made with his relatives, having his property in charge and especially that the chairman of the Council of Defense, who was the head of an organization formed to aid in carrying on the war, could not make any extortionate profit from the management of the land of an absent soldier. The second contention was upheld by the trial court, which rendered judgment in favor of the plaintiff for the rents from the land for the year 1918, but the trial court denied the first contention. The Supreme Court of the State of Oklahoma denied both contentions of the plaintiff made under the statutes of the United States and reversed the judgment with directions to the trial court to render judgment against the plaintiff and to dismiss his action. The final decision of the Supreme Court of the State of Oklahoma was made on the 7th day of February, 1922.

The leases involved in the action were unquestionably void. They were conceded to be void by the defendants at the trial. The leases were conceded to be void by the attorneys for the defendants in their opening statement to the jury. See pages 37-38 of the record. The trial court said:

> "The contract entered into in 1916 for the rent of this land in 1917 is conceded to be void." (Rec., p. 99.)

The trial court also said:

> "It is conceded that the contract made with the mother is void and of no effect." (Rec., p. 100.)

Among other reasons, these leases were void under the authority of the *United States* v. *Noble*, 237 U. S. 74, 59 L. ed. 844, and the following Oklahoma cases decided upon the authority of that case:

Brown v. *Vanpelt*, 166 Pac. 102;
Mullin v. *Noel*, 166 Pac. 742;
Taylor v. *Granger*, 174 Pac. 234,

all holding that leases made to commence in future by full-blood restricted Indians are void as the statute only permits leases in possession. The leases were also void for the reason that they were leases upon the homestead allotment of Eli Bunch, which by their terms expired more than a year from their date. Further argument is not needed to show the invalidity of the leases for the reason that such invalidity has so far never been disputed. The sole right to lease this land was derived from section 2 of the Act

approved May 27, 1908, being 35 Statutes 312. The Supreme Court of the State of Oklahoma held that where a lease prohibited by the Act of Congress is taken and possession of the rented lands is taken under such lease, then the lessee by virtue of section 3783, Revised Laws of Oklahoma, 1910, need pay only the rent stipulated in the void lease and that for the purpose of determining the rent to be paid the terms of the prohibited lease must be regarded. This is giving effect to the void lease. The decision is of great importance for the reason that it practically renders nugatory the statutes of the United States prohibiting the taking of leases from restricted full-blood Indians; and if the decision be good law, a man could contract to pay the Indian $5.00 per year for the use of his allotment, take possession under the contract and all he could be required to pay would be the $5.00. This would put a premium upon the taking of void leases, for possession, under the void lease, would validate the lease. The decision therefore not only affects this case but has a possible effect as to every lease made upon the land of a full-blood Indian, and the rule of law laid down in the opinion in this case ought not to stand for it allows a person taking the void lease to take possession of the land and then to defeat an action to recover the reasonable value of the use of the land. It was said in *Phillips* v. *Reynolds*, 113 N. W. 234, 79 Neb. 626:

> "An Indian may recover, in an action for mesne profits, the rental value of lands allotted to him by the United States Government, from

a person who has used and occupied the same under a lease that is void because not sanctioned and approved by the officers of the Interior Department."

The Supreme Court of the United States has held frequently that the state statutes and rules of state law cannot be used to validate directly or indirectly transactions with Indians which are prohibited by the laws of the United States. A few quotations from such opinions are as follows:

"Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for the reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as a matter of course that a conveyance made by one of them, before the title was vested in him, pursuant to the Act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel."

—*Starr* v. *Long Jim*, 57 L. ed. 670 at 675, 227 U. S. 613.

"The provisions of the supplemental agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect to convey an allotment thereafter to be selected either upon the ground of estoppel or because of any state statute having like force."

—*Mullen* v. *Pickens*, 63 L. ed. 1158 at 1161, 250 U. S. 590 at 592.

"A state statute could not make it the basis of passing subsequently acquired title when the federal statute pronounces it entirely void."

—*Monson* v. *Simonson*, 58 L. ed. 260 at 262, 231 U. S. 341.

"For, to permit an Indian's deed, void when made, to operate as a conveyance of title to lands subsequently allotted, would be to disregard the express language of the statute and defeat the protective purposes for which the law was passed."

—*Franklin* v. *Lynch*, 58 L. ed. 954 at 957, 233 U. S. 269.

By virtue of the statutes of the United States, the plaintiff had the right to have the leases taken by J. B. Cole and T. B. Mathews, which were prohibited by the laws of the United States, treated as void for every purpose and this right was denied by the state court. He had the right to have the state statute relied upon as defeating his action treated as repugnant to the statutes of the United States.

The petitioner also contends that by reason of the fact that during the years 1917 and 1918, he was in the active military service of the United States, pursuant to the laws of the United States, and was in a position where he could not himself look after his property, by necessary implication the laws of the United States gave him the right to have those who looked after his land in his absence deal fairly with him; and that by reason of the laws of the Unit-

ed States, such persons could not set up as a defense to his right to recover the amount collected by them, an unconscionable contract made with the ignorant full-blood mother of the plaintiff; and that the chairman of the Council of Defense, which was an organization formed pursuant to authority given by the laws of the United States, could not retain $1124.75 out of the rents collected by renting out the land of the plaintiff to third persons during the years he was in active military service of the United States. This question is of great public interest and ought to be passed upon by this court. The conceded situation is that the plaintiff was in active military service of the United States; that the chairman of the Council of Defense at Porum, Oklahoma, rented out his land and that the chairman of the Council of Defense had no valid contract with the plaintiff and had only a contract which was prohibited by the statutes of the United States. This claim of right was upheld by the trial court and denied by the Supreme Court of the State of Oklahoma and is worthy of the serious consideration of the Honorable Supreme Court of the United States, for when a soldier goes away to help carry on a foreign war, he cannot look after the property left behind, and the laws which take him away ought to be deemed to afford protection to his property in his absence, and the persons who voluntarily rented out the land ought to be deemed trustees and required to account for the proceeds.

The two questions above set out are the only questions involved in the case. They are both federal questions. They are both of great public interest.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send, to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in Case No. 11230, entitled *J. B. Cole and T. B. Mathews, Plaintiffs in Error, vs. Eli Bunch, Defendant in Error,* to the end that the said case may be reviewed and determined by this court, as provided by section 237 of the Judicial Code as amended, and that your petitioner may have such other and further relief in the premises as this court may deem appropriate and that the said judgment of the said Supreme Court of Oklahoma in said case and every part thereof may be reversed and set aside by this honorable court with proper directions.

ELI BUNCH,
By DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

To J. B. Cole and T. B. Mathews and Their Attorneys of Record:

Please take notice that the above petition for a writ of *certiorari* will be filed in the office of the Clerk of the United States Supreme Court on May 6th, 1922, and will be submitted to the said United States Supreme Court on the next motion day thereafter and on May 8, 1922.

DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

Due service upon us of the foregoing notice and of a copy of the foregoing petition is acknowledged this 22nd day of April, 1922.

.....,
.....,
.....,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

In obedience to the order of this court that counsel file briefs more particularly setting forth the statutes under which it is claimed that the leases involved in this suit are void, we hereby submit the following supplemental brief on behalf of the respondents.

It is admitted in the agreed state of facts that the petitioner Eli Bunch is a full-blood Cherokee Indian enrolled and recognized as such.

That he is the allottee of the land described in plaintiff's petition and was at the time of the institution of this suit the legal owner thereof.

That during the year 1915, the plaintiff rented said land to the defendants for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use of said land for the year 1916 and that the defendants used and occupied said land under said written contract.

That during the year 1916, on the 5th day of July, the plaintiff again re-rented said land to these defendants for the year 1917, by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year 1917, for a cash rental of $75.00, which sum was paid then and there by the defendants and accepted by the plaintiff in full for the use and occupation of said land for the year 1917, and that defendants occupied said land during the year 1917, as tenants of plaintiff under said contract.

Thereafter, to-wit: on July 28th, 1917, these defendants went to Mary Sunday the mother of plaintiff, in regard to the renting of said land and thereupon said Mary Sunday as the agent of plaintiff, Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these defendants the said allotment of land for a cash consideration of $75.00 and that these defendants

used and occupied said land during the year 1918, under said written contract with Mary Sunday as the agent of the plaintiff.

Under Act of May 27th, 1908, Sec. 2 of said Act, provides:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, that leases of restricted lands for oil, gas and other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior and not otherwise: *And provided further*, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Also Sec. 5 of the Act of May 27th, 1908, is as follows:

> "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or af-

ter the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

The Supreme Court of the United States in the case of *United States* v. *Noble,* found in 237 U. S. 74, 35th Sup. Ct. 532, 59th L. ed. 844, has held these leases to be void because they lap over and could not be executed in 1916, in July of that year for the following year of 1917, and our Supreme Court has followed the decision of the Supreme Court of the United States in the case of *Brown* v. *Van Pelt,* 64 Okl. 109, 166 Pac. 102; *Apple* v. *Pierce,* 56 Okl. 13, 155 Pac. 892; *Riordon* v. *Smith,* 62nd Okl. 48, 161 Pac. 798; *Boxley* v. *Scott,* 63rd Okl. 152, 162 Pac. 688.

We conceded in our original brief that these leases were void and could not be enforced, but we contend that this is not the question at issue in this case. If this was in truth to recover possession of the land because of the invalidity of the contract, the plaintiff could certainly recover, but this is not a suit to recover the land but is a suit to recover rents and profits for the years these respondents occupied said land under said void contracts.

Under our theory of the law the respondents were tenants at will of the petitioner. They were on his land under written contract, which, though void,

was with the full consent of the petitioner. This alone would make them tenants at will. The price for the rental was fixed by agreement and promptly paid by the respondents to the petitioner and which was accepted in full satisfaction for the leasing of said land.

We further contend that the void contract under which these respondents took possession of the land from the petitioner fixed the amount of the rental that was to be paid and which was paid and accepted by the petitioner as binding on both parties, and authorities to support this contention were cited in our original brief filed herein.

Respectfully submitted,

BENJ. MARTIN, JR.,
Attorney for Respondents.

Supreme Court of the United States.

October Term, 1908.

No. [redacted],

[redacted],

Petitioner,

vs.

J. B. COLE AND T. E. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PETITIONER.

DENNIS T. FLYNN,
ROBERT M. HAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* PETITIONER.

Statement of the Case.

This action was originally instituted in the District Court of Muskogee County, Oklahoma, by Eli Bunch as plaintiff against J. B. Cole and T. B. Mathews as defendants, to recover the landlord's customary share of the value of the crops produced on eighty acres of the plaintiff's lands for the years 1916, 1917 and 1918, in the sum of $2625.00, and for One Thousand Dollars exemplary damages and costs.

The plaintiff alleged in his petition that he was a full-blood Cherokee Indian, that he received as his homestead and surplus allotment the West One-Half of the Northeast Quarter of Section Sixteen, Township Ten North, Range Twenty East, that the plaintiff was in the United States military service during 1917 and 1918, that the defendants were co-partners and that in 1917 and 1918, the defendant, J. B. Cole, was chairman of the council of defense at Porum; that the land is fine bottom land, that in 1915, the defendants took a pretended lease on said land for the year 1916, which was void because in violation of the statutes of the United States, that in June, 1916, the defendants took a pretended lease upon said land for the year 1917, that in July, 1917, the defendants took a pretended lease on said land for the year 1918 from the mother of the plaintiff, and in May, 1918, took a pretended lease on said land for the year 1919 from the mother of the plaintiff, but that all said pretended leases were void because in violation of the statutes of the United States relating to the leasing of lands of full-blood Cherokee Indians, that said leases were made for a grossly inadequate consideration, that plaintiff's mother is uneducated and does not know land or rental values, and the defendants in dealing with her, were under the obligation while plaintiff was in the United States military service to deal fairly with her and pay a fair and adequate consideration for the use of said land, and owing to the difference in the position of the parties, the gross inadequacy of the consideration and the advantage

taken, said leases were absolutely void; that in law and good conscience the defendants could not make a large profit out of their dealings with the plaintiff and his mother and the plaintiff's property during the period he was in the United States military service.

That if the customary share of the crops had been turned over to the plaintiff for the years 1916, 1917 and 1918, he would have received about $2400.00 from said land, and that the defendants collected and retained that amount for themselves, and the value of the use of the land was at least the amount collected by the defendants and that the defendants unlawfully during each of said years sublet said land to tenants in violation of the statute and thereby forfeited their pretended leases.

The amended answer of the defendants in substance admitted the use and occupation of the land, set up the leases set out in plaintiff's petition, copies of which were attached, and further alleged that if the leases should be held void, they used and occupied the lands as tenants at will of the plaintiff and that they have paid the plaintiff in full for the use and occupation of the land.

In the trial in the District Court a stipulation covering some material facts of the controversy was entered into, as follows (Pr. Tr., p. 24):

"STIPULATION.

"It is hereby agreed by and betwen the plaintiff by his attorneys, Messrs. Neff & Neff,

and the defendants by their attorneys, Messrs. Crump, deGraffenried & White, that the following statement of facts are agreed to and may be offered in evidence in this case:

"*First.* That the plaintiff, Eli Bunch, is a full-blood, Cherokee Indian enrolled and recognized as such.

"*Second.* That he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.

"*Third.* That during the year 1915, the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year of 1915, and that these defendants used and occupied said land under said written contract.

"*Fourth.* That during the year of 1916, to-wit; on July 5th, 1916, the plaintiff again rerented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917, for a cash rental of $75.00, which said sum was then and there paid by defendant and accepted by the plaintiff in full for the use and occupation of said premises for the year of 1917 and that defendants occupied said land during the year of 1917, as tenants of plaintiff under said contract.

"*Fifth.* That during the year of 1917 the plaintiff became a soldier of the United States Government and was enlisted in the navy; during said year he was stationed at New York under the control of the Government and that while in New York these defendants by J. B. Cole wrote to said plaintiff in regard to leasing the land for the year of 1918 and asked for a rental contract on same and that plaintiff Eli Bunch in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year of 1918 for a cash consideration of $75.00 and that these defendants used and occupied said land during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed that this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings.

NEFF & NEFF,
Attorneys for Plaintiff.

CRUMP, DEGRAFFENRIED,
& WHITE,
Attorneys for Defendants."

The foregoing statement of facts was supplemented by oral testimony (Pr. Tr., pages 29 to 47). This evidence mainly relates to the value of the crops raised upon the premises for the crop years of 1916, 1917 and 1918, a summary of which is, as stated by the court in his instructions to the jury, (Pr. Tr. 56) that the defendants, Cole and Mathews, received for the year 1917 $890.40, being the value of one-fourth the cotton and one-third of the corn raised on the land, which together with interest at 6% makes a total of $997.24; said defendants received for the year 1918, corn and cotton of the value of $384.35, which together with one year's interest at 6% makes a total of $407.41. The jury in the District Court pursuant to directions of the court, returned a verdict for the plaintiff in the sum of $407.41, being the value of one-fourth the cotton and one-third of the corn raised on the plaintiff's land for the year 1918, and interest thereon (Pr. Tr. 27). Judgment was rendered pursuant to the verdict, motions for new trial were filed by plaintiff and defendants which were overruled, defendants appealed to the Supreme Court of this state and the plaintiff filed a cross-appeal.

In the trial court it was conceded by counsel for defendants that the leases taken by the defendants were void (Pr. Tr. 28). The same concession was made by them in their brief in the Supreme Court of the State of Oklahoma. The cause was submitted to the Supreme Court of the state, which thereafter delivered a written opinion reversing the judgment

of the trial court, in which it held in the syllabus as follows (Pr. Tr. 72):

> "*1.* Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided. Section 3783, R. L. Okla., 1910."
>
> "*2.* A tenant in possession of land under a void or voidable lease for one or more years creates a tenancy at will."
>
> "*3.* A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue."
>
> "*4.* Where an Indian leases his restricted land for a cash rental, even though the lease be void and the tenant is permitted to occupy the premises during the term of the lease, such Indian cannot thereafter maintain an action to recover the rental value of the land based on a share of the crop for the year so rented."
>
> "*5.* Where a tenant enters into possession under a void lease and he is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent governs the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises."

The Supreme Court of Oklahoma reversed the case with directions to render judgment for defendants, respondents herein (Pr. Tr. 77).

Petition for rehearing was filed by Eli Bunch, plaintiff in error, in that court, in which it was alleged in substance that the Supreme Court of the State of Oklahoma held that section 3783, Revised Laws, 1910, was applicable to a lease executed by a full-blood Cherokee Indian to his allotted land, and that said opinion was repugnant to the statutes of the United States and the policy of the United States government in exercising a protecting control over full-blood Indians and their lands. This petition for rehearing was denied and the plaintiff in error appealed to the Supreme Court of the United States, his petition for writ of *certiorari* being granted on the 15th day of November, 1922. Plaintiff in error, for grounds of reversal of the judgment of the Supreme Court of the State of Oklahoma, makes the following assignments of error:

> "*1.* The Supreme Court of the State of Oklahoma erred in directing the trial court to sustain the motion of the defendants, J. B. Cole and T. B. Matthews for judgment on the pleadings and stipulation of facts and render judgment in favor of the defendants and against the plaintiff.
>
> "*2.* Said Supreme Court erred in not holding that section 3783, Oklahoma Revised Laws of 1910 as applied to leases of a full-blood Cherokee Indian of his allotted lands is repugnant to the statutes of the United States.
>
> "*3.* The Supreme Court of the State of Oklahoma erred in holding and deciding that the leases taken by J. B. Cole and T. B. Mathews from Eli Bunch, which were prohibited by the laws of the United States, created rights in their

favor and fixed the amount which J. B. Cole and T. B. Mathews were required to pay for rent of the allotted land of Eli Bunch.

"*4.* The Supreme Court of the State of Oklahoma erred in holding that J. B. Cole and T. B. Mathews, by taking possession of the allotted land of Eli Bunch, a full-blood Cherokee Indian, under the leases prohibited by the laws of the United States, became tenants at will by reason of the laws of the State of Oklahoma.

"*5.* The Supreme Court of the State of Oklahoma erred in holding and deciding that by reason of the laws of the State of Oklahoma, J. B. Cole and T. B. Mathews were not liable for the rents collected from the allotted land of Eli Bunch, a full-blood Cherokee Indian, by virtue of leases prohibited by the laws of the United States.

"*6.* The Supreme Court of the State of Oklahoma erred in not holding and deciding that the laws of the State of Oklahoma relied upon to defeat the action of the plaintiff, Eli Bunch, were repugnant to the statutes of the United States, making the leases relied upon in this action utterly void and prohibiting the taking of such leases.

"*7.* The Supreme Court of the State of Oklahoma erred in holding that the Chairman of the Council of Defense at Porum, Oklahoma, was entitled to retain the sum of $1,124.75 out of a total of $1,274.75, collected by renting out the land of Eli Bunch during the period he was in actual military service of the United States."

ARGUMENT.

The foregoing assignments of error will be presented under the following propositions:

First: The leases executed by Eli Bunch to J. B. Cole and T. B. Mathews were void.

Second: The leases being void, the Supreme Court of Oklahoma erred in holding that plaintiff's measure of recovery was the amount of rental stipulated in the void leases.

I.

The leases executed by Eli Bunch to J. B. Cole and T. B. Mathews were void.

There can be no question as to the invalidity of the leases and this, as before stated, was conceded by counsel for respondents in both the District Court of Muskogee County and in the Supreme Court of Oklahoma, and the opinion in the Supreme Court of Oklahoma was based upon this assumption. Section 5 of the Act of Congress of May 27th, 1908 (C. 199, 35 St. 312), is as follows:

> "*Sec 5.* That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions

therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void."

In *United States* v. *Noble,* 237 U. S. 74, 35 Sup. Ct. 532, 59 L. ed. 844, this court held that the authority granted to Quapaw Indian allottees by the provisions of the Act of June 7, 1897 (chap. 3, 30 Stat. L. 62), to lease their lands, did not empower such allottees to make leases subject to valid existing leases on the same property which still had several years to run. The lease there involved was a mining lease but the case has been followed and the same principle applied by the Supreme Court of the State of Oklahoma to agricultural leases on lands of allottees of the Five Civilized Tribes; and Eli Bunch, the full-blood Cherokee Indian plaintiff, is a member of one of these tribes.

In *Brown* v. *Van Pelt,* 64 Okla. 109, 166 Pac. 102, the syllabus reads:

"*1.* A lease made by a full-blood Creek Indian woman of her homestead allotment on January 4, 1913, to begin on January 1, 1914, and to expire December 31, 1914, the same not being approved by the Secretary of the Interior, is in violation of the Act of Congress of May 27, 1908, and is void.

* * * * * * *

"*4.* A lease executed on January 4, 1913, by a full-blood Creek Indian woman on her restricted surplus allotment to commence January 1, 1914, to run for a period of four years, where it

> is not shown that it was necessary to make the new lease at such time in order to regulate the course of cultivation that was to be pursued the subsequent year is void."

To the same effect are:

> *Apple* v. *Pierce*, 56 Okla. 13, 155 Pac. 892;
> *Reirdon* v. *Smith*, 62 Okla. 48, 161 Pac. 798;
> *Boxley* v. *Scott*, 62 Okla. 152, 162 Pac. 688;
> *Mullen* v. *Noah*, 64 Okla. 181, 166 Pac. 742;
> *Mullen* v. *Carter*, (Okla. Sup.) 173 Pac. 512;
> *Dowell, et al.*, v. *Brown, et al.*, 208 Pac. 220.

All of these cases are based on *United States* v. *Noble, supra; Brown* v. *Van Pelt, supra,* quoted with approval from that case as follows:

> "In the light of this restriction, and of the governmental policy which induced it, there is sound reason for construing the power as not authorizing anything more than a *lease in possession,* as well understood in the law."

The lease is also void in its entirety upon the following grounds:

The lease so far as concerns the homestead is void because it runs for more than one year from its date. A separate lease on Bunch's surplus allotment was not taken but the entire allotment was included in one lease. There was no separate consideration for the homestead and surplus. The entire lease is void since the transaction involved was one prohibited by positive federal statute. It was illegal in the sense that it was in violation of an express provision of law.

Further, under section 1681, Compiled Statutes of Oklahoma, 1921, it was a felony for the plaintiffs to place on record an instrument taken in violation of law affecting the title to the homestead allotment of Eli Bunch, a full-blood Cherokee Indian. This section is as follows:

> "1681. *Recording Deed—Punishment:* Any person, firm or corporation, who shall file for record or cause to be recorded any deed or other instrument in writing in the office of any register of deeds of any county in this state, purporting to convey any title to any real estate, allotted to any member of any one of the Five Civilized Tribes or Osage Tribe, as a homestead, prior to the removal of the restrictions by operation of law, or otherwise, knowing the land conveyed to be restricted homestead lands, shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary at hard labor for not less than one year."

A part being void and against the prohibition of positive law, and the consideration being entire, the whole lease is void.

It was held in *Mann* v. *Brady,* 80 Okla. 299, 196 Pac. 346, that a contract for the sale of lands which included the restricted forty acres homestead of a Creek Indian was void in its entirety and was not good as to the unrestricted portion of the land.

II.

The leases being void the Supreme Court of Oklahoma erred in holding that the plaintiff's measure of recovery was the amount of rental stipulated in the void lease.

The Supreme Court of Oklahoma in its opinion affirming the judgment of the District Court of Muskogee County, asserted the law to be as follows (Pr. Tr. 75):

> "Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease, the terms stipulating the amount of the rent to be paid shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for."

Citing in support of this proposition:

Evans v. *Winona Lumber Co.*, 16 N. W. 404;
Laughran v. *Smith*, 75 N. Y. 205;
Thurber v. *Dwyer*, 10 R. I. 355;
Larkins v. *Avery*, 23 Conn. 304;
Morrill v. *Mackman*, 24 Mich. 279.

The Supreme Court of Oklahoma at another place in the opinion said (Pr. Tr. 75):

> "If the lease was void so that he could have demanded possession of the premises but failing to demand possession he waived the right, therefore a tenancy at will existed.
>
> "This was held in *Peters* v. *Holder*, 40 Okla. 93, 136 Pac. 400: 'A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent

be paid, the tenancy becomes one from year to year. *Tate* v. *Gaines*, 25 Okla. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc. 1031.

"Section 3783, Revised Laws of Oklahoma, 1910, provides: 'Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided.'

"In *Tate* v. *Gaines*, 25 Okla. 141, 105 Pac. 193, Dunn, J., quotes approvingly from *Cunningham* v. *Holton*, 55 Mo. 33, which court defines a tenancy at will as follows: 'A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words.'"

It will thus be seen that the Supreme Court of Oklahoma permitted a state statute, section 3783, *supra*, and state decisions applicable to others than Indians, to accomplish indirectly that which was prohibited by federal statutes and the governmental policy of the United States. We will presently discuss the cases cited by the court in support of its position, but let us first examine the applicability of the rule of law announced by the Supreme Court of the state to a restricted Cherokee Indian.

In *Franklin* v. *Lynch*, 233 U. S. 269, 18 L. ed. 954, this court held that equitable defenses urged against an intermarried Choctaw Indian were not applicable and that said lands could only be conveyed in con-

formity with the Acts of Congress and refused to give any efficacy to a state statute providing that the after acquired title of the grantor should inure to the grantee. Referring to the effect of the void deed the court said:

> "The deed of 1905 was therefore a nullity and did not estop her or her assigns from showing that it had been made in direct violation of the statute. For, to permit an Indian's deed, void when made, to operate as a conveyance of land subsequently allotted, would be to destroy the express language of the statute and to defeat the protective purposes for which the law was passed."

In the case of *Mullen* v. *Gardner*, 250 U. S. 590, 63 L. ed. 1158, this court again refused to apply the doctrine of estoppel as against a conveyance made in violation of an Act of Congress. We quote from the last paragraph of that opinion, the following language:

> "The provisions of the Supplemental Agreement having permitted no conveyance of an interest in the tribal lands prior to allotment, it is obvious that this policy cannot be evaded by giving to a conveyance with warranty or its equivalent, made prior to actual allotment, effect as a covenant to convey an allotment thereafter to be selected, either upon the ground of estoppel or because of any state statute having like force."

In *Laughton* v. *Nadeau*, reported in 75 Fed. 789, the court held that proceedings with reference to Indian lands, which were void by reason of being in

violation of a federal statute, could not be cured by ratification or waiver. We think the expression of that court in the last paragraph of its opinion is applicable to the case now before this court. We quote from that opinion as follows:

> "The defendants contend that the complainant is barred by laches and estoppel to maintain this suit, and have pleaded the Kansas statutes of limitation. The proceedings before the probate court being void, they could not be cured by ratification or waiver. There being no color of title, the statute of limitation does not apply. There could be no purchaser in good faith under these proceedings."

In the case of *Briggs* v. *Sample*, reported in 43 Fed. 102, the court had under consideration a case involving the lands of a Kickapoo Indian, and we quote from the first section of the syllabus the following language:

> "An Indian conveyed his land by warranty deed on the day he made such proof, and after he had obtained his patent conveyed the land to another grantee. *Held*, that the second grantee took the land, since the first deed, being made before patent, was ineffectual to convey the land, either directly or by estoppel."

In the case of *Starr* v. *Long Jim*, decided by this court, and reported in 227 U. S. 715, 57 L. ed. 671, it was held that a conveyance made in violation of a federal statute could not pass title, nor could the plea of estoppel be urged in behalf of such a conveyance. The language of the opinion in the last paragraph is as follows:

"Since it is entirely plain, in the case before us, that the title to the lands in question was retained by the United States for reasons of public policy, and in order to protect the Indians against their own improvidence, it follows as a matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the Act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel."

In the case of *Oklahoma Oil Company* v. *Bartlett*, 236 Fed. 488, the Circuit Court of Appeals of the Eighth Circuit, in referring to the equitable principles of ratification and waiver, used the following language on page 494:

"The contention cannot be sustained. The proceedings before the County Court of Hughes County, Oklahoma, were void and could not be cured by ratification or waiver. The deed approved by said County Court without jurisdiction, was a nullity, and such conveyance was void. There could be no purchaser in good faith under these proceedings. No laches can be imputed to Jack Gouge. He and his land were under the control of the government. *Laughton* v. *Nadeau, et al.*, (C. C. A.) 75 Fed. 789; *Felix* v. *Patriet*, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. ed. 719. The United States statute prohibited the defendant or his grantor from taking title to the property in controversy without the approval of the County Court having jurisdiction of the settlement of the estate of said deceased allottee, and defendant cannot indirectly build a title by estoppel or any statute of limitation."

Both the questions of estoppel and the statute of limitations were before the Supreme Court of the State of Kansas in *Sheldon* v. *Donohoe*, reported in 19 Pac. 902, and we call attention to the language of the court as found on page 903:

> "Donohoe had no other title nor any better right to convey to Sheldon than he had when the void deed was made. Sheldon was incapable of taking the title to the land then, and has been ever since that time. By the paramount federal law he was prohibited from taking the title, and therefore he cannot indirectly build up one by adverse possession, estoppel, or any statute of limitations."

We call the court's attention to the case of *Monson* v. *Simonson*, decided by this court and reported in 231 U. S. 344, 58 L. ed. 260, wherein the court discussed the application of the rule with reference to after acquired title. In the next to the last paragraph we find the following language:

> "As that patent was issued June 29, 1905, and as the deed from the allottee upon which alone the judgment of affirmance was rested was made and delivered May 31, preceding, it follows that this deed was, in the language of the statute, absolutely null and void, and that the title subsequently acquired by the allottee through the final patent could not inure to the plaintiff in virtue of his being the grantee in that deed. See, *Starr* v. *Long Jim*, 227 U. S. 613, 624, 57 L. ed. 670, 675, 33 Sup. Ct. Rep. 358. A state statute could not make it the basis of passing subsequently acquired title when the federal statute pronounces it entirely void."

In numerous decisions of the Supreme Court of the State of Oklahoma that court has held that where there is a conflict between a state statute and a federal statute or a state statute and the policy of the United States Government is exercising its protective care over the persons and estates of Indian allottees, that the former must yield to the latter. Thus in the case of *Malone* v. *Wamsley*, 80 Okla. 181, 195 Pac. 484, the Supreme Court of Oklahoma said:

> "Section 1 of the Enabling Act under which Oklahoma was admitted into the Union (34 Stat. L. 267) provides 'that nothing contained in the state constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.' The Constitutional Convention of Oklahoma by a proper resolution irrevocably accepted the terms of the Enabling Act, and it is apparent under the provisions of the Enabling Act, Congress specifically reserved the right to exclusively legislate with respect to the Indian tribes located in the State of Oklahoma, and regulate the sale of their allotted lands. In determining the power of members of the Five Civilized Tribes to alienate their lands, we must look only to the laws of Congress.
>
> "In the case of *Gorman* v. *Sheldon*, Mr. Justice KANE, speaking for this court, said: 'The

reason the state cannot legislate for an Indian of the Five Civilized Tribes is that Congress has reserved the right to legislate for him as a dependent people.' 43 Okla. 139, 131 Pac. 680.

"In the case of *Collins Inv. Co., et al.*, v. *Beard,* wherein a construction of sections 884 and 885, Revised Laws of 1910, was involved, which sections, when considered together, provide that a minor of 18 years of age has a limited right to contract relative to his lands subject to his disaffirmance upon becoming of age by restoring the consideration, this court, in the opinion delivered by Commissioner BREWER says: 'The statutes above referred to need no analysis, or even a construction here for the reason that when the question of the removal of the restrictions of allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress, and to those acts and laws alone. In other words, if a state law, by its language or through its proper construction or its operation would permit the alienation of restricted Indian allotment, or render a deed thereto effective, where the land would not be alienable or the deed thereto effective under the acts of Congress dealing with the subject-matter, then the state laws fail; and this, because of federal government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms of which Oklahoma became a state; and this reservation of jurisdiction was assented to in the constitution which the people adopted.' 46 Okla. 310, 148 Pac. 846.

"In the case of *Smith* v. *Williams, et al.*, Mr. Justice HARRISON, delivering the opinion of this court, held: 'From the beginning it has

been the stated policy of this court and also the federal courts, in determining the validity of deeds to restricted Indian lands, to look to the acts of Congress alone.' 78 Okla. 297.

"*Walker* v. *Brown*, 43 Okla. 144, 141 Pac. 680; *Jefferson* v. *Winkler*, 26 Okla. 653, 110 Pac. 755; *Murrow Indian Orphans Home* v. *McClendon*, 64 Okla. 205, 166 Pac. 1101; *Ex parte Webb*, 225 U. S. 663; *Williams* v. *Johnson*, 239 U. S. 414; *Brader* v. *James*, 246 U. S. 88; *Truskett* v. *Closser*, 198 Fed. 635; *Barbre* v. *Hood*, 228 Fed. 658.

"It is now well settled in this jurisdiction that the County Courts, in approving conveyances of full-blood Indian heirs, perform the duty of federal agents, and are controlled and regulated by the laws of the Congress, and in determining the validity of the acts of the County Courts in approving conveyances executed by Indian heirs, we must look solely to the Acts of Congress."

In *Smith* v. *Williams*, 190 Pac. 555, the Supreme Court of Oklahoma say:

"The principles of equity, though not overturned nor disregarded, are not controlling in such cases, for the reason that they are not applicable. The right on the part of an Indian to alienate his land, and the right on the part of any person to purchase such land and to acquire valid title thereto is peculiarly and strictly a statutory right created by Acts of Congress, and which right is not possibly available except through the means which Congress has prescribed, for Congress has expressly said that any attempt to acquire such rights, except through the means prescribed by Congress, shall

be absolutely null and void. Therefore title to restricted Indian land cannot be acquired from the allottee upon equitable grounds. The methods prescribed by Congress are exclusive."

To the same general effect are:

Jackson v. *Carroll*, .. Okla. ..., 207 Pac. 735;

Murrow Indian Orphans Home v. *McClendon*, 64 Okla. 205, 166 Pac. 1101;

Ashton v. *Noble*, 46 Okla. 296, 148 Pac. 1042;

Miller v. *Grayson*, 166 Pac. 1077;

Groom v. *Dyer*, 179 Pac. 12;

Parks v. *Berry*, 169 Pac. 884;

Wrigley v. *McCoy*, 175 Pac. 259;

Cravens v. *Amos*, 166 Pac. 140;

Whitmire v. *Levine*, 80 Okla. 21, 193 Pac. 884;

Tidal Oil Co. v. *Flanagan*, 209 Pac. 729;

Bell v. *Fitzpatrick*, 53 Okla. 574, 157 Pac. 334;

Brink v. *Canfield*, 187 Pac. 223.

See, also:

Barbre v. *Hood*, 228 Fed. 628;

Priddy v. *Thompson*, 204 Fed. 995;

Blanset v. *Cardin*, 256 U. S. 319, 65 L. ed. 950.

The opinion of the Supreme Court of the State of Oklahoma in this case, if permitted to stand, will nullify section five of the Act of Congress of May 27th, 1908, *supra*, which made the lease null and void and will thereby frustrate the governmental policy

in dealing with these dependent people, for, in applying section 3783, *supra,* of the Oklahoma Statutes, the court holds in effect that if the lessee under the void lease secures possession of the premises he will only be required to pay the rent stipulated in the lease. This will permit to be done indirectly what the Congress of the United States prohibits. It leads to an absurdity for, under the rule thus announced, a designing person would be permitted to secure the signature of an incompetent full-blood Indian to a lease of his allotted lands for five or ten years at a rental of $10.00 per year, secure possession of the leased lands and, when dispossessed, would be required to pay only the amount of rent stipulated in the lease. This would certainly effectually enforce a material provision of the void lease.

The cases cited by the Supreme Court of Oklahoma in support of the rule announced by it that where a tenant enters into possession under a void lease and is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent govern the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises are not, in our opinion, applicable for the reasons heretofore stated and for other reasons. The rule announced by these cases is in harmony with the general rule that where a statute of frauds requires a lease to be in writing and an oral lease is made, which, because of said statute, cannot be enforced and possession is taken un-

der the oral lease, the terms of the oral lease govern, except as to the period of renting. This rule does not apply to a lease that is void because made in violation of an express statute or of public policy. Nor does it apply to a lease made by any person *non sui juris.* In the case of an oral lease required to be in writing under the statute of frauds the parties are capable, at the time, of making a valid lease and if the lease had been made in writing it would be valid and enforceable. In other words, they had the right to contract. Such leases have never been regarded as void in the sense that they are prohibited by law.

At the time Eli Bunch made the leases in controversy the statutes of the United States expressly prohibited the making of such leases and the defendants were prohibited likewise from taking such leases and the statute declared such leases to be null and void. It was not a case of two persons competent to contract making an oral lease when the law required the lease to be in writing, but was a lease being made in writing which the law in express terms prohibited from being made at all.

We understand the correct rule is that where a contract is prohibited by law none of its terms can be regarded for any purpose and where one of the persons making it is *non sui juris,* the other party can claim no right based upon the void instrument.

In *Gennert* v. *Wessner,* (N. J.) 31 Atl. 609, the court said:

"The contract is wholly void and incapable of ratification, and must be entirely ignored, in dealing with the business transactions between the parties, precisely as though no such writing had ever existed."

To the same effect are:

Day v. *McAllister,* 15 Gray 433;
Winfield v. *Dodge,* (Mich.) 7 N. W. 906;
State v. *Ryan,* (N. J.) 8 Atl. 293.

It was said by the Supreme Court of Wisconsin in a lease case:

"The written instrument offered in evidence, as we have said, was void. It was not competent to prove the contract by it. What, then, was the contract as to the payment of rent? This must be determined without regard to the terms of the written agreement. This logically follows from the fact that that agreement was void, and could not be resorted to to determine the contract of the parties."

—*Vinz* v. *Beatty,* 21 N. W. 787.

Regarding the effect of a void lease, the Supreme Court of Iowa, in *McIntosh* v. *Lee,* 57 Iowa 356, 10 N. W. 895, said:

"But something more than mere occupation of the premises would be necessary to the ratification of the lease. That might render the tenant liable under an implied promise for the *quantum meruit,* but not for the rent stipulated in the lease according to its terms."

In the case of *McGreedy* v. *Macklin,* 12 Okla. 666, 73 Pac. 293, the Supreme Court of Oklahoma had un-

der consideration a matter wherein the lease of a restricted Indian of one of the tribes in Oklahoma had been made, which lease was approved by the Secretary of the Interior and contained a provision forbidding the subletting, assigning, leasing, conveying or transferring of any interest of the lessee without the consent of the Indian lessor and the approval of the Secretary of the Interior, and the lessee in violation of said provision, having sublet the premises or a portion thereof to the defendant, brought a suit to recover the stipulated rental from the defendant and the court in that case held that the assignment or subletting being in violation of that provision was void and created no rights and, in its opinion, quoted from the case of *Uhlig* v. *Garrison,* 2 Dak. 71, 2 N. W. 253, as follows:

> "The contract in this case is to be distinguished from those which are merely void from want of compliance with some form or those lacking any other essential. Here it was prohibited by statute and being unlawful it does not fall within the class of contracts which are void because of the inefficiency of one of the parties or because of the statute of fraud. * * * "

And, in the opinion of the case, further said:

> "The theory of the law is that while the relations the parties occupy toward each other might, and no doubt would, under ordinary circumstances create the relation of landlord and tenant, yet by reason of the illegality of their contract the relation of landlord and tenant is not created and does not legally exist."

Therefore in the case at bar the contract between Bunch and the lessees being forbidden by the statute no contract exists and not even the relation of landlord and tenant exists between the parties, and in that state of law the plaintiff is entitled to recover under section 7359 of the Compiled Oklahoma Statutes of 1921, which provides as follows:

> "The occupant of any land without special contract shall be liable for the rent to any person entitled thereto,"

and which statute has been construed by the Supreme Court of Oklahoma to give the owner of the land the right to recover the reasonable rental value irrespective of the relation of landlord and tenant.

—*McBrayer* v. *Miller*, 200 Pac. 988, and authorities cited therein.

As the Indian was at all times the owner of the land and the contract being void and creating no rights as to either party and prohibiting no right on behalf of the Indian on account of the United States statute prohibiting the lease being made for his benefit, the Indian under the state statute quoted above is entitled to and should recover the actual value of his rents from the premises.

It is settled by the case of *U. S.* v. *Hinkle*, 261 Fed. 518, decided by the Circuit Court of Appeals for the Eighth Circuit, that one who occupied lands of a full-blood Indian under illegal contracts must account for the rents collected. In that case it was held:

"*2.* The United States, in a suit for cancellation of conveyances of Indian lands made in violation of restrictions upon their alienation, may have an accounting of mineral rents and profits unlawfully received by defendants."

It is true that in that case the suit was by the United States, but the United States could sue only in behalf of the Indian. If the Indian was not entitled to the rents, the United States could not sue for their recovery. So we regard this case as directly in point.

It will be noted that the Supreme Court of Oklahoma, in its opinion in the case at bar, stated that the relation created by the respondents remaining in possession under the void lease was a tenancy at will (Pr. Tr., p. 75). In the case of *Dowell, et al.*, v. *Brown, et al.*, 208 Pac. 220, under a similar situation the court held that the relation created was that of tenancy by sufferance and that the amount of the recovery was the rental value of the premises for the time withheld, in the following language:

"The reasons above given in that case, where the deed was void and the whole estate in the property involved, and in the instant case, where the leasehold estate is involved are analogous, and the valid lease thereto contained no provision for making improvements or payment therefor, but did provide that the lessee agrees to repair fence and house on the premises, and, in addition thereto, was to pay a rental value for the premises of $60 per annum for the period of five years. And the valid lease having expired

by its own terms, as hereinbefore stated, on the 31st day of December, 1917, and as the lessee held over thereafter, and used the premises for the years 1918 and 1919, being, in effect, at most, a tenant by sufferance, he became bound to the owner for the rental value of the premises for said years, and, the owner being under no contract, either expressed or implied, to pay for the value of improvements, such tenant could not offset the value of the same against the claim of the owner for rents. And in such situation the fact that improvements may have been made by the tenant, and, if any, the value of the same were immaterial, and the trial court committed no error in sustaining the objections of the plaintiffs to the defendant's offer to show that certain improvements had been made by him, and the value thereof."

For the foregoing reasons we respectfully submit that the Supreme Court of Oklahoma erred in reversing the decision of the District Court of Muskogee County and directing that court to render judgment for the defendants, respondents herein.

We pray that the judgment of the Supreme Court of Oklahoma in this cause be reversed.

Respectfully submitted,

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Supreme Court,
FILED
MAR 15 1923
WM. R. STANSBU
CLE

No. 338

In the

Supreme Court of the United States.

October Term, 1922.

ELI BUNCH, *Petitioner,*

VERSUS

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF RESPONDENTS.

BENJ. MARTIN, JR.,
Attorney for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

AUTHORITIES CITED.

Evans v. *Winona Lumber Co.*, 16 N. W. 404.... 6

Guffy v. *Pollan*, 175 Pac. 817..... 2

Nash v. *Berkmeir*, 83 Ind. 536..... 6

Peters v. *Holder*, 136 Pac. 400..... 3

Steele v. *Anheuser-Busch Brewing Association*, 57 Minn. 18..... 7

Snyder, et al., v. *Harding*, 80 Pac. 789..... 8

Tate v. *Gaines*, 105 Pac. 193..... 4

Thurber, et al., v. *Dwyer*, 10 R. I. 355..... 8

Opinion of the Supreme Court of Oklahoma in the instant case, and authorities therein cited.. 11

IN THE

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IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* RESPONDENTS.

Statement by Respondents.

We hereby accept the statement of facts as set forth and detailed in the brief of the petitioner herein.

BRIEF *and* ARGUMENT.

I.

It is contended by the respondents that even though the rental contract entered into by and between the petitioner and the respondents for the

years 1917 and 1918 were void because made before the end of the year or too long before the contracts became effective or were to begin, still the respondents, having taken possession of the land under these contracts and paid the cash consideration for the rental thereof and being permitted to remain in possession by the petitioner, Eli Bunch, and having accepted the rentals provided for in said contracts in full satisfaction of the rentals, then these respondents were tenants at will of the said Eli Bunch, petitioner under said void contract.

The case of *Guffy* v. *Pollan*, found in 175 Pac., at page 817, was a case where written instruments were executed by Mary Turkey and her husband who were restricted Indians at the time of the execution of these instruments and is on all-fours with the present case in holding that the lease under which defendants entered was void because of federal restrictions, still the parties were in possession under this void lease and as such became tenants at will or from year to year.

The first syllabus of this opinion is as follows:

> "A tenant in possession under a void, or defective lease for a term of years creates a tenancy at will, and if periodical rent be paid, the tenancy becomes one from year to year—following *Peters* v. *Holder*, 40 Okl. 93."

And in the body of the opinion the court holds as follows:

> "Although it appears from the evidence that the tenant, Pollan, was in possession of the

premises in dispute under a void lease, it appears that he had been in possession and had paid yearly rental for the years 1914 and '15, and had occupied the premises for the year 1916. Although the lease under which he held may have been void, yet he was a tenant from year to year, and was not subject to have the tenancy terminated at the time the suit was instituted October 3, 1916. It was said by the court in *Peters* v. *Holder,* 40 Okl., at page 96: 'An entry under a void, or defective, lease for a term of years creates a tenancy at will, and if periodical rent be paid the tenancy becomes one from year to year.' Citing *Tate* v. *Gaines,* 25 Okl. 141; 24 Cyc 1031—citing a long list of authorities in support of that proposition. Therefore, Holder held as a tenant from year to year and until his tenancy was terminated by three months' notice in writing."

It cannot be said that this doctrine will not apply to restricted Indians, for the reason that the above cited case was one of a full-blood restricted Indian making a written lease on her land. This decision holds that under such a lease the lessee becomes tenant at will of the lessor.

In the case of *Peters* v. *Holder,* found in 136 Pacific, at page 400, quoting from the second syllabus, this language is used:

> "A tenant in possession under a void, or defective lease for a term of years creates a tenancy at will and, if periodical rent be paid, the tenancy becomes one from year to year. Citing *Tate* v. *Gaines,* 25 Okl. 141; 24 Cyc 1031. And other cases see Landlord & Tenant Cent. Dig., paragraphs 373 to 381, 402-415."

In the case of *Tate* v. *Gaines,* 105 Pac., at page 193, the syllabus reads as follows:

> "An allottee of land in the Creek Nation, which was inalienable by virtue of the provisions of Act of Congress March 1, 1901, for valuable consideration made, executed, and delivered a warranty deed thereto, and accompanied the same with a contract, which provided substantially that should the said grantor, at any time, become dissatisfied with the sale, or fail or refuse to carry out the provisions of the deed, she would pay to the grantee, his heirs, or assigns, all money paid for the purchase price of said land and for all improvements made thereon, less a reasonable allowance for rents for the use of the land during the time grantee held it.
>
> "The grantor exercised her right to repossessing herself of the land without a repayment of the moneys as agreed in the contract. Grantee brought suit for the same, and at the same time tendered a deed of conveyance to the land. To his petition setting up substantially the foregoing facts a demurrer was filed, which was by the trial court sustained. *Held, error.*"

In the body of this opinion, Judge DUNN refers to the case of *Rogers, et al.,* v. *Hill,* decided by the Court of Appeals of the Indian Territory, reported in 3 Ind. Ter. 562, 64 Southwestern Reporter 536, in which Judge DUNN says:

> "In that case, as in this, there was an invalid conveyance or contract of sale and of the possession of the grantee the court said: 'It has been uniformly held that possession under an invalid conveyance or contract of sale creates

a tenancy at will, and where a tenant goes into possession under an invalid lease his tenancy at its inception is merely a tenancy at will.' Citing *Hall* v. *Wallace,* 88 Cal. 434, 26 Pac. 360; *Packard* v. *Railroad Co.,* 46 Ill. App. 244; *Lehman* v. *Nolting,* 56 Mo. App. 549; *Howard* v. *Merriam,* 5 Cush. (Mass.) 583; *McIntosh* v. *Lee,* 57 Iowa 356."

Thus it will be seen from the above decisions that it is the established law of this state by our Supreme Court, that where a tenant goes into possession of the land, even that of a full-blood restricted Indian, under a defective, or void lease, his possession is that of a tenant at will. This is bound to be so because a tenant is in possession with the consent and full authority of the owner, and hence cannot be treated as a trespasser. Therefore, we conclude that it is an incontrovertible fact that Cole and Mathews, the respondents, were in possession of the land in controversy during the years 1917 and '18, as tenants at will of the petitioner, Eli Bunch.

II.

Having determined from the above authorities that the respondents were tenants at will of Eli Bunch, petitioner, the next question which naturally presents itself is this:

What rental must they pay for the use of this land during this time?

This question is fully and completely answered by the following authorities which we present:

In the case of *Nash, et al.*, v. *Berkmeir*, 83 Ind., page 536, the first syllabus reads as follows:

> "A wife's parol lease of her land for a term of five years, made without her husband's concurrence, may be enforced in respect to the terms for payment of rent against the lessee holding possession under the lease. In this case the lease was oral and held for five years when the statute of fraud in that state prohibited an oral lease for a longer period than three years, and a lessee was held by this decision to be a tenant from year to year, and in concluding the case, after citing numerous authorities, the court held: 'By a plain analogy of these decisions, and in harmony with the just and equitable principles which underlie them it must be held that so long as appellee retains the possession which he obtained under, and in consequence of the lease in question, he must pay rent according to its terms. Further than this the case does not require us to go; to stop short would be to convert the law into an instrument of fraud'."

In the case of *Evans* v. *Winona Lumber Co.*, found in the 16th volume of the Northwestern Reporter at page 404, the court in its syllabus uses this language:

> "An oral lease for a term of three years, with a right in the lessor to terminate at any time upon four months' notice is void under section 10, chapter 41, Gen. Statute 1878, as being for a term 'exceeding one year.' But if the lessee goes into possession under it, it regulates the terms of the tenancy as respects rents. In this case the plaintiff orally leased said prem-

ises to defendant at an annual rent of $300.00 for a term of three years. Upon this state of facts plaintiff is entitled to recover the annual rent fixed by the oral lease, namely the sum of $300.00. The lease is for three years, subject to the lessor's right of termination; that is to say, it is liable to be defeated by something in the nature of a contention subsequent, to-wit: An affirmative act on the part of the lessor. Until this act is done it is in form a lease for three years, and therefore void under section 10, chapter 41, Gen. Statute 1878, as being for a term 'exceeding one year.'

"But though void as a lease, the rule is that if the lessee goes into possession under it, it regulates the terms of the tenancy as respects rents. (Citing *Laughran* v. *Smith*, 75 N. Y. 205; *Thurber* v. *Dwyer*, 10 R. I. 355; *Larkins* v. *Avery*, 23 Conn. 304; *Morrill* v. *Mackman*, 24 Mich. 279; Taylor Landlord & Tenant, paragraph 80; Wood Landlord & Tenant, paragraph 25.)

"This ruling may not be logical; very likely it is not as an original proposition, but if it is the ruling established by the authorities there can be no doubt. We have not had our attention caalled to any authority to the contrary, nor have we discovered any."

In the case of *Steele* v. *Anheuser-Busch Brewing Association*, 57 Minn. 18, the Supreme Court of Minnesota, in 1894, used this language in its syllabus:

"*Evans* v. *Lumber Co.*, 30 Minn. 515, followed to the effect that a lease void under the statute of fraud will nevertheless regulate the terms as to rent if the tenant goes into possession and occupies the premises."

In the case of *Albert D. Thurber and another* v. *Thomas Dwyer,* found in the 10th volume of the R. I. Reporter at page 355, this language is used in the syllabus:

> "*Held,* further, that although void as to the duration of the time thereof, it nevertheless regulated the terms of the tenancy in other respects and made it a holding from year to year, which might be terminated by giving notice in writing at least three months prior to the expiring of the occupation year."

And in the body of the opinion the court uses this language:

> "Although the lease be void as to duration of term it nevertheless regulates the terms of the tenancy in other respects and the tenant who enters under it is held to be a tenant from year to year upon those terms."

In the case of *Snyder, et al.,* v. *Harding,* found in the 80th Pacific, page 789, a written lease was entered into between the owner of the land and O. G. Harding for a term of three years, which lease was held to be void for the reason that all of the owners thereof had not signed the lease, or entered into the contract. Harding went into possession under this void lease and cultivated the land for the year 1900, in which lease contract he agreed to pay a one-third of the grain raised on the said place to the owners of the land, and for the first year, to-wit, 1900, he gathered the crops and accounted to the owners of the land for one-third value of all grain raised, which they accepted, and he remained on the place

to make a crop for the year 1901. After he had started the crop the owners of the land brought suit against him, contending that his contract was void and got a restraining order restraining said Harding from removing any of the crops from the place, or, in any manner, disposing of same.

Afterwards by agreement between all of the parties the crops raised during the year 1901 were sold and the proceeds thereof placed in the hands of the clerk to be held by him for final decision by the court. The plaintiffs recovered judgment in the Supreme Court for the possession of the land, but nothing was said as to the distribution of the money in the hands of the court held as proceeds for the crop for the year 1901, and after the case was affirmed Harding, the lessee, then moved for a distribution of the money awarding to himself two-thirds and the owners of the land one-third, which was resisted by the owners of the land upon the ground that the lease was void and he (Harding) had no rights whatever, of any kind, to the premises.

The court hearing said motion granted the same and gave to Harding, the lessee, two-thirds of the money deposited in the court as the proceeds of said crop, and the owners of the land one-third of said money, from which decision the owners of the land appealed again to the Supreme Court, and the Supreme Court affirmed the decision of the lower court, and used this language in the second syllabus:

> "Where a lessee took possession of premises under an invalid lease stipulating that the

lessee should have three-fourths of the crop raised and the landlord one-fourth thereof, and raised a crop, the crop should be divided between the parties on the basis fixed in the lease."

In the body of the opinion the court uses this language:

"The respondents then being entitled to the tenant's share of the crop the only question remaining to be considered is: How were the crops to be divided? The lease provides as for the year 1901, appellant should be entitled to one-fourth and the respondents to three-fourths, and the trial court made the division on that basis. Was the lease to be considered in making such division? We think it was. In determining the term of the periodical tenancy created by the entry and payment of rent reference may be made to the invalid lease, and the lessee becomes bound by stipulations therein applicable to the periodical lease. 18 Am. & Eng. Ency. of Law, (2nd ed.) 195-196; *Nash* v. *Berkmeir,* 83 Ind. 536; *Steele* v. *Anheuser-Busch Brewing Association,* 57 Minn. 18; *Kennochan* v. *Wilkins,* 3 App. Div. 596, 38 N. Y. Sup. 236."

Thus we see from the above authorities the courts hold that even though a tenant is occupying land under a void lease contract, yet it is the duty of the court to look to the void lease in determining the amount of rentals to be paid.

Now, applying this law to this case, what, we ask, would be the rentals to be paid by the respondents? In the agreed stipulation it is admitted that in these rental contracts the respondents paid to the

petitioner the sum of $75.00 rental for each of the years 1917 and 1918, and that petitioner Eli Bunch accepted said sum from the respondents as a full satisfaction for the rental of said land for said two years.

Thus we contend that the petitioner has no cause of action against the respondents, and that the court at the conclusion of the petitioner's testimony should have sustained the demurrer of the respondents to the evidence, and at the conclusion of all the evidence the court should have sustained the motion of the respondents for a peremptory instruction to the jury to return a verdict in favor of the respondents.

III.

We submit herewith the opinion rendered in this cause by the Supreme Court of the State of Oklahoma and make the same a part of our argument as to why this case should be affirmed in this court:

"*In the Supreme Court of the State of Oklahoma. J. B. Cole and T. B. Mathews, Plaintiffs in Error, vs. Eli Bunch, Defendant in Error. No. 11230.*

SYLLABUS.

"Filed in Supreme Court of Oklahoma, May 31, 1921. William M. Franklin, Clerk.

"*1.* Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided. Section 3783, R. L. Okla. 1910.

"*2.* A tenant in possession of land under a void or voidable lease for one or more years creates a tenancy at will.

"*3.* A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue.

"*4.* Where an Indian leases his restricted land for a cash rental, even though the lease be void and the tenant is permitted to occupy the premises during the term of the lease, such Indian cannot thereafter maintain an action to recover the rental value of the land based on a share of the crop for the year so rented.

"*5.* Where a tenant enters into possession under a void lease and he is permitted by the landlord to retain such possession, the terms specified in the lease for the payment of rent governs the tenant's liability for rent and the landlord's right to recover for the use and occupancy of the premises.

"Error from the District Court of Muskogee County, Oklahoma. Benjamin B. Wheeler, Judge.

"Action by Eli Bunch against J. B. Cole and T. B. Mathews to Recover Rents on Farming Land. Judgment for the Plaintiff. Defendants Appeal. Reversed.

"W. J. Crump, R. P. deGraffenried, Myron White, Attorneys for Plaintiffs in Error.

"William Neff, L. E. Neff, Harry G. Davis, Attorneys for Defendant in Error.

"*Opinion of the Court by* MILLER, J.—This action was commenced in the District Court of Muskogee County on June 5, 1919, by Eli Bunch

as plaintiff against J. B. Cole and T. B. Mathews, defendants, to recover the rental value of certain land belonging to the plaintiff for the years 1916, 1917 and 1918. The case was tried to a jury and at the close of the trial the court gave a peremptory instruction to the jury to return a verdict in favor of the plaintiff for a certain sum and the court thereupon rendered judgment on the verdict of the jury. The defendants filed a motion for a new trial which was overruled and perfected this appeal. For convenience the parties will be referred to as they appeared in the court below.

"The petition states that the plaintiff is a full-blood Cherokee Indian and so enrolled. Plaintiff's claim is for the use of eighty acres of land, forty acres of which is his homestead allotment and the remaining forth acres a part of his surplus allotment. That by reason of certain acts of Congress his allotment was inalienable and he could not lease the homestead for more than one year at a time. That it is bottom land and approximately forty acres was in cultivation and the remaining part in timber and pasture. Defendants had the use of the land during the years of 1916, 1917, 1918. Part of the cultivated portion of the land was put in cotton and part in corn each year. He states that in May, 1917, he enlisted in the United States Navy and served in the Navy until he was discharged in January, 1919. He then asks that he recover $2,625.00 as rents for the years 1916, 1917 and 1918 and exemplary damages in the sum of $1,000.00.

"The defendants filed an answer setting up rental contracts for this land for the years 1916, 1917 and 1918 and alleged the rents had been paid under the terms of the contract. To this

answer plaintiff filed a verified general denial. It will not be necessary to make any detailed statement of the defense set up in the answer as practically all of defendant's defense has been agreed to in a stipulation of facts entered into by the parties, which is as follows: 'It is hereby agreed by and between the plaintiff by his attorneys, Messrs. Neff & Neff, and the defendants by their attorneys, Messrs. Crump, de Graffenreid & White, that the following statement of facts are agreed to and may be offered in evidence in this case: *First.* That the plaintiff, Eli Bunch, is a full-blood Cherokee Indian enrolled and recognized as such. *Second.* That he is the allottee of the land described in plaintiff's petition and is now, and has been, the legal owner thereof. *Third.* That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of the said land for the year of 1916, and that said sum was fully paid by the defendants in cash and accepted by the plaintiff in full satisfaction for the rent of said land for the year of 1916. That said contract was dated and executed on October 4th, 1915, for the use of said land for the year 1916, and that these defendants used and occupied said land under said written contract. *Fourth.* That during the year of 1916, to-wit, on July 5th, 1916, the plaintiff again rerented said land to these defendants for the year of 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year of 1917 for a cash rental of $75.00, which said sum was then and there paid by defendants and accepted by the plaintiff in full for the use and

occupation of said premises for the year of 1917, and that defendants occupied said land during the year of 1917 as tenants of plaintiff under said contract. *Fifth.* That during the year of 1917, the plaintiff became a soldier of the United States Government and was enlisted in the navy, during said year he was stationed at New York under the control of the Government, and that while in New York these defendants by J. B. Cole wrote to the said plaintiff in regard to leasing the land for the year of 1918, and asked for a rental contract on same and that the plaintiff, Eli Bunch, in reply to this letter advised the defendants that he had left his allotment in charge of Mary Sunday, his mother, and that they must go to see her in regard to renting it. And thereafter, to-wit, on July 28th, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff in regard to the renting of said land and thereupon the said Mary Sunday as the agent of the plaintiff Eli Bunch, entered into a written contract as such agent with these defendants, by the terms of which written contract she let and rented to these two defendants the said allotment of land for the year 1918, for a cash consideration of $75.00, and these defendants used and occupied said land during the year 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. And it is further agreed that this stipulation may be regarded as part of the pleadings for the purpose of motion on judgment on the pleadings. Neff & Neff, Attorneys for Plaintiff. Crump, de Graffenried & White, Attorneys for Defendants.'

"The defendants then filed the following motion for judgment on the pleadings: 'Comes now the defendants and moves the court to grant them a judgment on the pleadings together with

the stipulation of facts filed herein and of this they pray judgment of the court.'

"This was overruled by the court. Thereafter a trial was had with the results as above stated. The defendants make several asignments of error. Before considering any of them, we wish to observe that the record discloses plaintiff to be a very intelligent Indian, he having had seven years' schooling in the Chilocco Indian School and two years in the common schools before going to Chilocco. It will only be necessary to consider the motion for judgment on the pleadings and stipulation of facts. The motion should have been sustained.

"The defendants in error have cited a large number of cases which as we view this case have no application and it will not serve any good purpose to point out the distinguishing features.

"The only reason claimed that these leases were void is that they were made prior to the date of the beginning of the lease. The courts have recognized that it was often necessary and to the best interest of the Indian to lease his land prior to the first day of January of the year for which the land is leased.

"The plaintiff was satisfied with the rental for the year 1916 of $75.00 and made no complaint. He certainly could not make a complaint two or three years thereafter. In 1916, he was willing to lease his land for the year 1917 for a cash rental of $75.00. The defendants continued in possession and put in their crops, all of this occurring before he enlisted in the Navy and he made no objections to it. He certainly cannot be heard to complain two years later. In July, 1917, he instructed the defendants to make arrangements with his mother for the leasing

of the land for 1918. Under this instruction they did arrange for the leasing of the land and on the same terms that he had been willing to lease it for the preceding years. They paid the cash rental in advance as had been their custom and it does not appear that any undue advantage was taken. If the lease was void so that he could have demanded possession of the premises but failing to demand possession he waived that right, therefore a tenancy at will existed.

"This was held in *Peters* v. *Holder*, 40 Okl. 93, 136 Pac. 400: 'A tenant in possession under a void or defective lease for a term of years creates a tenancy at will, and, if periodical rent be paid, the tenancy becomes one from year to year. *Tate* v. *Gaines*, 25 Okl. 141, 105 Pac. 193, 26 L. R. A. (N. S.) 106; 24 Cyc 1031.'

"Section 3783, Revised Laws of Oklahoma, 1910, provides: 'Any person in the possession of real property, with the assent of the owner, is presumed to be a tenant at will unless the contrary is shown, except as herein otherwise provided.'

"In *Tate* v. *Gaines*, 25 Okl. 141, 105 Pac. 193, DUNN, J., quotes approvingly from *Cunningham* v. *Holton*, 55 Mo. 33, which court defines a tenancy at will as follows: 'A tenancy at will is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication as well as by express words.'

"Conceding the lease to be void, the rule is that if the tenant goes into possession under the lease and holds under the lease the terms of the lease stipulating the amount of rent to be paid

shall govern the rents the landlord is entitled to receive as well as the amount of rents the tenant is liable for.

"*Evans* v. *Winona Lumber Co.*, 16 N. W. 404; *Laughran* v. *Smith*, 75 N. Y. 205; *Thurber* v. *Dwyer*, 10 R. I. 355; *Larkins* v. *Avery*, 23 Conn. 304; *Morrill* v. *Mackman*, 24 Mich. 279.

"If the plaintiff had been seeking to obtain possession of the premises because the lease was void a very different question would be presented here. It is urged by the plaintiff that he was in the Navy from May, 1917, until the end of the year 1918. This is all true and we believe that every protection should be given the boys who responded to the call of their country.

"If we say the acts of an agent duly appointed by a person while they were in the service of either the army or navy may be ignored at will, it will open the door for all kinds of fraud. Such a rule would make it unsafe for any person to deal either with the soldier or his agent in any way. The result would be that all of the real estate of the soldier would remain idle and he would not recive any income whatever from it. If he rented the land for cash rent, he could rescind the cash payment clause in the contract and demand that the tenant account on a basis of a share of the crop. If he rented it for a share of the crop and the tenant delivered the agreed share as per the contract, he could then say the rent received was not enough and that it was worth a certain sum on a cash basis and demand settlement on that basis. If any such rule had been established before the war, or if it was known such a rule would thereafter be established, it would have been unsafe for any person to contract to rent land belonging to a sol-

dier or belonging to a person that by any possible means might become a soldier. As a result millions of acres would have been uncultivated at the very time the products of the soil were most needed.

"The plaintiff contends: 'That where the Chairman of the Council of Defense took charge of the land of a soldier under contracts conceded to be void, and rented the same out, he is chargeable as a trustee for what he collected; that the chairman of the Council of Defense cannot be allowed to deny that the land was actually worth what he received for its use;' this has no application for this plaintiff specifically designated his mother as his agent to attend to the leasing of the land for him. The chairman of the Council of Defense had nothing to do with it.

"The plaintiff makes a further statement in his brief (brief of defendant in error) that the lease was void for the reason that Cole and Matthews sublet the land to other parties. This might be grounds to dispossess the persons in actual possession of the premises, but does not in any way affect the rights of the parties in this action.

"The judgment of the trial court is reversed with instructions to sustain the motion of the defendants for judgment on the pleadings and stipulation of facts, and render judgment in favor of the defendants and against the plaintiff..

"HARRISON, C. J., JOHNSON, MCNEILL, ELTING and KENNAMER, J. J., concur."

Under this opinion there are but two questions for decision; *1st*, under the state of facts as agreed to in this case are the respondents tenants at will of

the petitioner? And we submit that this question is fully and ably discussed by the opinion referred to in this brief; and the *second* question, if the respondents are held to be tenants at will of the petitioner and even though the leases that they took possession under were void, how are you to arrive at the price to be paid by the respondent? and we contend that this question is fully answered by the decisions referred to in our brief.

We respectfully submit this cause believing that the judgment of the Supreme Court of Oklahoma should be in all things affirmed.

Respectfully submitted,

BENJ. MARTIN, JR.,
Attorney for Respondents.

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No. [redacted]33

In the

Supreme Court of the United States.

October Term, 1922.

ELI BUNCH, *Petitioner,*

versus

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Supplemental Brief of Petitioner.

DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 328.

ELI BUNCH, *Petitioner,*

vs.

J. B. COLE AND T. B. MATHEWS, *Respondents.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF OF PETITIONER.

In compliance with the order of this court that counsel file further briefs more particularly setting forth and dealing with the statutes under which counsel claim that the leases involved are void, this supplemental brief is filed on behalf of the petitioner.

In order to show the applicability of the statutes to the facts, particularly as to the leases involved, we here repeat the portions of the agreed statement of facts necessary to show said application. The agreed statement as to part of the facts,

however, upon which the case was tried, is set forth in full in the original brief herein. We quote therefrom parts as follows:

> "It is hereby agreed * * * that the following statements of facts are agreed to and may be offered as evidence in this case:
>
> "*1.* That the plaintiff, Eli Bunch, is a full-blood Cherokee Indian enrolled and recognized as such.
>
> "*2.* Taht he is the allottee of the land described in plaintiff's petition and is now and has been the legal owner thereof.
>
> "*3.* That during the year 1915 the plaintiff rented said land to the defendants for agricultural purposes by written contract for one year and by the terms of which the defendants were to pay the plaintiff $75.00 for the use and occupancy of said land for the year 1916. * * * And that these defendants used and occupied said land under said written contract.
>
> "*4.* That during the year 1916, to-wit, on July 5, 1916, the plaintiff again re-rented said land to these defendants for the year 1917 by written contract executed on said date and by the terms of which these defendants were to use and occupy said land during the year 1917 for a cash rental of $75.00, which said sum was then and there paid by defendants and accepted by the plaintiff in full for the use and occupation of said premises for the year 1917 and that defendants occupied said land during the year 1917 as tenants of plaintiff under said contract.
>
> "*5.* * * * and thereafter, to-wit, on July 28, 1917, these defendants went to see Mary Sunday, the mother of the plaintiff, in regard to the renting of said land and thereupon the said

Mary Sunday, as the agent of the plaintiff, Eli Bunch, entered into a written contract as such agent with these defendants by the terms of which written contract she let and rented to these defendants the said allotment of land for a cash consideration of $75.00, and that these defendants used and occupied said land during the year of 1918 under said written contract entered into with Mary Sunday as the agent of the plaintiff. * * *"

From which agreed facts it will be seen that the plaintiff, who is the petitioner herein, Eli Bunch, is an enrolled fullblood Cherokee Indian and that the land involved is his allotment as such Indian and that the defendants were in possession of the land during the year 1916 under a rental contract for said year 1916; that while so in possession of land and in July of the year 1916, the said defendants, who are the respondents herein, entered into another rental contract with the Indian for the use of the premises for the year 1917 and that while so in possession of the premises during the year 1917 under said rental contract, the lessees, respondents herein, entered into another rental contract in July, 1917, for the use of the premises for the year 1918, and the lessees under said contract did use and occupy the premises during the years 1917 and 1918 under said rental contracts. The suit herein is only for the recovery of the rents by the Indian from the lessees for the year 1917 and the year 1918 for the rents received by the lessees or for the reasonable rental value of the premises as said rental value

for each of said years was far in excess of the sum of $75.00.

It is also alleged in the plaintiff's petition that the land in question was the homestead and surplus allotment of the said Eli Bunch and this is agreed by all parties to be true as provided in the last clause of the said stipulation.

The petitioner, Eli Bunch, contends that the leases were absolutely void under the statutes hereinafter cited, as applied to the foregoing facts, as construed in the case of *U. S.* v. *Noble*, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. ed. 844, and that, being so void, he is entitled to recover the reasonable rental value of the lands received by the lessees, all of which was far in excess of the amount provided in the leases. The lessees, the respondents herein, did not occupy the premises personally, but sublet the same to their tenants.

The provisions of the statutes of the United States which are controlling and govern the facts in this case are as follows: Sections 1, 2 and 5 of the Acts of Congress of May 27, 1908, chapter 199, 35 Stat. at L. 312:

> "*Section 1.* That from and after sixty days of the date of this act the status of the lands allotted heretofore or hereafter to the allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrance, be as follows: All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen and as mixed-blood Indians having

less than half Indian blood, including minors, shall be free from all restrictions.

"All lands except homesteads of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood, shall be free from all restrictions.

"All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood including minors of such degrees of blood and all allotted land of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26, 1931."

"*Section 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years without the privilege of renewal, provided * * * leases of restricted homesteads for more than one year and leases of restricted lands for periods of more than five years may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secretary of the Interior, and not otherwise. * * *"

"*Section 5.* That any attempted alienation or encumbrance by deed, mortgage, contract to sell, power of attorney or other instrument or method of encumbering real estate made before or after the approval of this act, which affects the title of the land allotted to allottees

of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act, shall be absolutely null and void."

Inasmuch as the land was already held by the lessees during the year 1916 under a lease from the Indian, Eli Bunch, then, under the authority of the case of *United States* v. *Noble, supra,* no valid lease could be made between the said Indian and the lessee in July of 1916 for the leasing of the premises for the year 1917, and likewise under the same authority the lessees, being in possession of the premises during the year 1917, claiming under a lease, could not, in July, 1917, make a valid lease then for the year 1918 as the Indian was only empowered to make leases under the statutes set forth above, *in possession and could not make a lease in futuro.* This rule has, as laid down in the *Noble* case, *supra,* that the Act of May 27, 1908, does not permit the making of leases *in futuro* by restricted Indians, been followed consistently by the Supreme Court of the State of Oklahoma:

Brown v. *Van Pelt,* 64 Okl. 109, 166 Pac. 102;

Appel v. *Pierce,* 56 Okl. 13, 155 Pac. 892;

Riordon v. *Smith,* 62 Okl. 48, 161 Pac. 798;

Boxley v. *Scott,* 63 Okl. 152, 162 Pac. 688.

Also the leases involved in this case covered the homestead allotment of Eli Bunch and were not ap-

proved by the Secretary of Interior, as required by section 2 of the Act of May 27, 1908.

As more or less bearing upon the questions involved herein, we also quote sections 19 and 20 of the Act of April 25, 1906, 34 St. L. 144:

> "*Section 19.* That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress * * *. Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior."

> "*Section 20.* That after the approval of this act all leases and rental contracts except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribe shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval."

From which statutes we think that there is clearly shown the purpose and intent of Congress that such leases as the ones under which the respondents attempted to hold the lands for the years 1917 and 1918 are absolutely null and void and of no effect

whatever, and, being "of no effect" whatever, cannot be looked to for any purpose because if the said leases could be looked to as fixing the rentals then the same would be of some effect and said leases would not be absolutely void and of no effect as Congress has so intended.

Therefore, this petitioner was and is entitled to recover the reasonable rental value of said premises for the said years, and the said petitioner could not be prohibited from so recovering the said rental value by any instrument which was absolutely null and void and of no effect.

Respectfully submitted,

DENNIS T. FLYNN,
ROBERT M. RAINEY,
STREETER B. FLYNN,
WILLIAM NEFF,
LEWIS E. NEFF,
Attorneys for Petitioner.

BUNCH *v.* COLE ET AL.

ERROR AND CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 33. Submitted March 16, 1923.—Decided November 19, 1923.

When a lease of an Indian allotment made by the allottee in excess of the powers of alienation allowed him by acts of Congress, is declared by those acts to be absolutely null and void, a state statute which, as applied by the state court, gives it effect as creating a tenancy at will and as controlling the amount of compensation which the allottee may recover for the use and occupation of the land by the persons named as lessees, is to that extent invalid under Article VI, cl. 2, of the Constitution. P. 253.

85 Okla. 38, reversed; certiorari dismissed.

ERROR to a judgment of the Supreme Court of Oklahoma which reversed a judgment recovered by the present

plaintiff in error in a trial court, in his action to recover for wrongful use and occupation of his allotted land.

Mr. Dennis T. Flynn, Mr. Robert M. Rainey and *Mr. Streeter B. Flynn,* for plaintiff in error and petitioner. *Mr. William Neff* and *Mr. Lewis E. Neff* were also on the briefs.

Mr. Benjamin Martin, Jr., for defendants in error and respondents.

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action by an Indian allottee to recover for a wrongful occupancy and use of his land.

The plaintiff was an adult Cherokee Indian of the full blood, enrolled and recognized as a member of the tribe and still a ward of the United States. The land was an eighty-acre tract which had been allotted to him in the division of the tribal lands,—forty acres as a homestead and the remainder as surplus land. He had full title, but his power to alien or lease was subject to restrictions imposed by Congress for his protection. By three successive instruments, each given for a cash rental of $75, he leased the land, both homestead and surplus, to the defendants for agricultural purposes. The first lease was given late in 1915 for a term of one year beginning January 1, 1916; the second was given early in July, 1916, for a term of one year beginning January 1, 1917, and the third was given late in July, 1917, for a term of one year beginning January 1, 1918. The defendants went into possession under the leases, and in 1917 and 1918 sublet the land to others. From the subletting the defendants realized $890.40 in 1917, and $384.35 in 1918, these sums representing the actual rental value on a crop-sharing basis in those years.

The action was begun in 1919 on the theory that the leases were made in violation of the restrictions imposed

by Congress, and therefore were wholly void. At first a recovery was sought for all three years, but afterwards the claim for 1916 was dropped. On the trial the court treated the leases for 1917 and 1918 as void, but ruled that the plaintiff had waived the invalidity of the lease for 1917 by not promptly objecting to any occupancy or use under it, and so could not recover for that year. A recovery was had for 1918 of a sum conforming to what the defendants had realized from the subletting for that year, with interest. Both parties appealed to the Supreme Court of the State, and it reversed the judgment with a direction that no recovery be allowed for either year. 85 Okla. 38. That court treated the leases for both years as void; but construed and applied a statute of the State as in effect requiring that the leases be regarded as creating a tenancy at will and controlling the amount which the plaintiff was entitled to demand and receive. This was done over his objection that the state statute, so construed and applied, was in conflict with the congressional restrictions, and therefore was invalid. The plaintiff prosecutes this writ of error. Upon his petition a writ of certiorari was granted, 260 U. S. 716, but as it appears that the writ of error was well grounded, the writ of certiorari will be dismissed.

The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 316; *Monson* v. *Simonson*, 231 U. S. 341, 347; *Brader* v. *James*, 246 U. S. 88, 96; *Mullen* v. *Pickens*, 250 U. S. 590, 595.

An examination of the several enactments by which Congress has restricted the leasing of Cherokee allotments

for agricultural purposes [1] discloses that when the leases in question were given the situation was as follows:

1. An adult allottee of the full blood could lease the homestead for not exceeding one year, and the surplus for not exceeding five years, without any approval of the lease, but could not lease for longer periods without the approval of the Secretary of the Interior.

2. Any lease not permitted by the restrictions was to be "absolutely null and void."

The permission given to lease for limited periods without approval was not intended to authorize the making of leases which were to begin at relatively distant times in the future, but only the making of such as were to take effect in possession immediately or, what was equally within the spirit of the permission, on the termination of an existing lease then about to expire. *United States* v. *Noble*, 237 U. S. 74, 82–83. And see *Dowell* v. *Dew*, 1 Younge & Collier's C. C. 345, 357; same case on appeal, 7 Jurist, 117.

It is conceded, and we think rightly so, that the leases for 1917 and 1918 fell outside the permission given. Both covered the homestead as well as the surplus land; both were made midway during the term of a like lease theretofore given and were to take effect in possession on the expiration of that lease, and neither was approved by the Secretary of the Interior. Being outside the permission, they were, as declared in the restricting provision, "absolutely null and void."

Obviously a lease which Congress, in the exertion of its power over land allotted to an Indian ward, pronounces absolutely void cannot be validated or given any force by a State; and a state statute which requires that such a

[1] Act of July 1, 1902, c. 1375, § 72, 32 Stat. 716, 726; Act April 26, 1906, c. 1876, §§ 19 and 20, 34 Stat. 137, 144; Act May 27, 1908, c. 199, §§ 2 and 5, 35 Stat. 312.

lease be regarded as effective for any purpose is necessarily invalid in that respect. *Monson* v. *Simonson, supra; Mullen* v. *Pickens, supra.*

The Supreme Court of the State, although recognizing the invalidity of the leases under the congressional restrictions, construed and applied a statute of the State (§3783, Rev. Laws 1910) as in effect requiring that the leases be regarded as creating a tenancy at will and controlling the compensation which the allottee could demand and the defendants should pay for the occupancy and use of the land. We of course must treat the local statute as intended to operate as that court says it does, and must determine its validity on that basis. In that view of it, we think the conclusion is unavoidable that it gives force and effect to leases which a valid enactment of Congress declares shall be of no force or effect, and that in this respect it must be held invalid under Article VI, cl. 2, of the Constitution of the United States.

The state court was persuaded that its conclusion had support in decisions dealing with leases made between parties entirely competent to make them but not executed in conformity with local laws, such as the statute of frauds. But decisions of that class are not apposite. These leases were made in violation of a congressional prohibition. They were not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification by him. Nothing passed under them and none of their provisions could be taken as a standard by which to measure the compensation to which the allottee was entitled for the unauthorized occupancy and use of his land.

It is not our province to enquire particularly into the need for the protection intended to be afforded by the restrictions, but, if it were, the need would find strong illustration in this case; for it appears that each of the leases was obtained for a cash rental of $75 and that when

the time arrived for assuming possession under them the defendants readily sublet the land on terms which netted them $890.40 in 1917 and $384.35 in 1918, the latter year being one of pronounced drought.

Judgment reversed on writ of error.
Writ of certiorari dismissed.

CRAIG *v.* HECHT, UNITED STATES MARSHAL